TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 263

FIDELITY-PHILADELPHIA TRUST COMPANY, AND ROBERT A. WORKMAN, EXECUTORS OF THE ESTATE OF ANNA C. STINSON, DECEASED, PETITIONERS,

vs.

WALTER J. ROTHENSIES, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 17, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

APPENDIX TO BRIEF FOR APPELLANTS

INDEX TO APPENDIX

APPENDIX.

1. DOCKET ENTRIES.

1941		
June	11	Complaint filed.
June	11	Summons exit.
July	29	Summons returned "on June 11, 1941 served" and filed.
Aug.	19	Answer filed.
Aug.	21	Order to place case on Trial List filed.
Dec.	6	Order to place case on Trial List filed.
1942		
Feb.	16	Trial—Witnesses sworn c.a.v.
Feb.	25	Testimony filed.
Apr.	4	Defendant's requests for findings of fact and conclusions of law filed.
Apr.	15	Plaintiffs' requests for findings of fact and conclusions of law filed.
1943		
Jan.	8	Opinion, Ganey, J. granting judgment for defendant filed.
Jan.	8	Judgment in favor of defendant with costs filed. 1/9/43 Noted & Notice mailed.

Feb.	12	Plaintiffs' Notice of Appeal filed. 2/13/43 Copy to G. A. Gleeson, Esq.
Feb.	12	Copy of Clerk's Notice to U. S. Circuit Court of Appeals filed.
Feb.	12	Bond for costs on appeal in $250., with Travelers Indemnity Co., surety filed.
Feb.	12	Designation of Record on appeal filed.
Feb.	12	Stipulation of Agreed Facts filed.

2. COMPLAINT.

The plaintiffs complain against the defendant and allege as follows:

1. Fidelity-Philadelphia Trust Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania having a place of business at 135 S. Broad Street, Phila elphia. Robert A. Workman is a citizen of the United S tes residing at 426 Montgomery Avenue, Haverford, Pennsylvania.

2. The defendant, Walter J. Rothensies, at the times herein referred to was and is the Collector of Internal Revenue for the First District of Pennsylvania and resides in the Eastern Judicial District of Pennsylvania. This is a suit of a civil nature to cover estate taxes erroneously paid to the defendant and is upon a cause of action arising under the Internal Revenue Laws of the United States.

3. Anna C. Stinson died November 17, 1934, a citizen of the United States, residing at Morris and Yarrow Avenues, Bryn Mawr, Montgomery County, Pennsylvania, leaving a will dated June 6, 1930, which was on November 22, 1934 duly admitted to probate by the Register of Wills of Montgomery County, Pennsylvania. A copy of said will is hereto attached, made a part hereof and marked "Exhibit A". On November 22, 1934 letters testamentary were granted by said Register to plaintiffs, Fidelity-Philadelphia Trust Company and Robert A. Workman, and the said plaintiffs became and now are executors of the estate of said decedent.

4. On March 26, 1928 the said decedent made, executed and delivered a certain trust indenture, a copy whereof is

hereto attached, made a part hereof and marked "Exhibit B".

5. In the trust so created there were, on the date of decedent's death, securities having a value on that date of $84,433.39. The assets of said trust were acquired by transfer from decedent prior to March 3, 1931 as follows:

March 26, 1928 $65,000. cash;

May 31, 1928 $10,000 cash; and

$25,000 par value United States of America 3rd Liberty Loan 4¼s due September 15, 1928 which were redeemed at par on September 15, 1928.

The assets in said trust at the time of decedent's death are the proceeds of said funds all received prior to March 3, 1931.

6. On or about September 5, 1935 plaintiffs prepared and filed with defendant at Philadelphia an estate tax return for the estate of said decedent showing an estate tax due of $53,386.59 and on said date paid said tax to the defendant as Collector of Internal Revenue at Philadelphia. The assets of said trust were not included in the taxable assets of the estate, but notice of the trust was placed on the return.

7. The Commissioner of Internal Revenue and the defendant subsequently contended that the assets of said trust should be included in the taxable estate of said decedent and subsequently, to wit, on December 24, 1936, plaintiffs paid to the said Collector of Internal Revenue the further sum of $17,555.63, $16,554.33 thereof as additional estate tax upon the estate of said decedent in part by reason of inclusion of the assets of the said trust and interest of $1,001.30.

8. At the time of her death the said decedent was survived by two daughters, Florence V. Stinson and Nancy C. Stinson.

9. The Presbyterian Hospital in Philadelphia, The Contributors to the Pennsylvania Hospital, The Philadelphia Home for Incurables and the Board of National Missions of the Presbyterian Church of the United States of America were in existence upon the date of decedent's death, and still are in existence, and have capacity to take and receive gifts and bequests, and are and were all charitable or religious corporations or associations within the meaning of the Revenue Laws of the United States in force upon the date of this decedent's death, and bequests to them, or any of them, are deductible in determining the taxable estate under such laws.

10. The will of said decedent is valid under the law of Pennsylvania in force at the death of said decedent, and is adequate under such law to exercise the power of appointment contained in said trust indenture in any event where the power is granted or reserved by said decedent in said indenture.

11. Plaintiffs aver that the assets of said trust of March 26, 1928 should not properly and legally have been included in the taxable estate of said decedent and that had they not been included the tax would have been $57,244.14 with interest of $255.18, or a total of $57,499.32 and not the total of $70,942.22 actually paid.

12. Plaintiffs aver that the correct estate tax upon the estate of said decedent was $57,499.32 and that there has been an overpayment of estate taxes upon the estate of said decedent of $12,696.78 by reason of the erroneous inclusion in the taxable assets of said estate of the assets of said trust of March 26, 1938 at a valuation of $84,433.49

and an overpayment of interest of $746.12, or a total overpayment of $13,442.90.

13. On November 22, 1939 the Fidelity-Philadelphia Trust Company, Executor of the Estate of Anna C. Stinson, on behalf of said estate filed with the Collector of Internal Revenue at Philadelphia upon Form 843 a claim for refund inter alia of said sum of $13,442.90. A copy thereof is hereto attached, made a part hereof and marked "Exhibit C".

14. An Internal Revenue Agent at Philadelphia has approved the contention made in this complaint and recommended allowance of said claim for refund to the extent of $12,696.78, the principal of said tax which by law carries a refund of interest thereon. A copy of such recommendation is hereto attached, made a part hereof and marked "Exhibit D".

15. Notwithstanding the recommendation aforesaid, no action has ever been taken on said claim for refund, and the same has never been either allowed or rejected, nor has the Commissioner of Internal Revenue ever sent any registered letter either allowing or rejecting said claim in any respect, notwithstanding more than six months has elapsed since the filing thereof.

Wherefore, plaintiffs demand judgment against the defendant in the sum of $13,442.90 with interest from December 24, 1936, according to law.

C. Russell Phillips,
Attorney for Plaintiffs.

EXHIBIT A.

I, ANNA C. STINSON, widow of Robert M. Stinson, of Bryn Mawr, Montgomery County, and State of Pennsylvania, make this my last Will and Testament, and revoke all other wills at any time heretofore made by me.

FIRST: I direct my Executors hereinafter named to pay my just debts and funeral expenses as soon as convenient after my decease.

SECOND: All my furniture, books, pictures, jewelry, silver, and generally all articles of personal and household use and ornament, I give and bequeath as provided in a separate memorandum, which will be found with this my will, except that all necessary furnishings of my residence in Bryn Mawr shall remain in the house during the minority of my daughters, as hereinafter provided. Any articles not so disposed of by the said memorandum shall fall into my residuary estate.

THIRD: I direct that during the minority of my two daughters, and until the youngest attains the age of twenty-one years, my residence, on Morris and Yarrow Avenues, Bryn Mawr, Pennsylvania, shall be maintained as a home for them, or either of them. The necessary furnishings of the home to remain therein during said period. The entire cost of maintenance, including, housekeepers' and servants' wages supplies of all kinds, and the general upkeep, to be charged against the general income from my residuary estate, even though one of my daughters should remove therefrom during the said period. After both of my daughters shall have attained the age of twenty-one (21) years, my said residence shall form a part of my residuary estate, and payments from the income of my estate for its maintenance shall cease. If one of my daughters should continue to reside there, after both are over the age of twenty-one years, a suitable rental shall be

charged her, so that the benefits of my estate shall accrue to my said daughters equally. If neither of them desires to reside therein, and both, or the survivor of them, shall notify my trustees to that effect, in writing, I authorize my Trustees, in their discretion to sell the said property, under the authority hereinafter given to sell real estate.

FOURTH: All the rest, residue and remainder of my estate, real, personal and mixed, of which I may die seised and possessed, or which I may have in expectancy or remainder, or over which I may have power of disposition by Will, hereby expressly exercising any such power in me vested, I give, bequeath and devise to my Executors hereinafter named, In Trust, nevertheless, to take, hold, manage and control, and to invest and keep invested, and the net income therefrom to pay at quarterly, or other convenient periods, to my daughters, Florence V. Stinson and Nancy C. Stinson, in equal shares, for and during their respective lives, subject, however, to this provision, that upon the attainment of the age of thirty (30) years by the oldest of my said daughters, or upon my decease, if she is then over that age, my Trustees shall pay to each of my said daughters the sum of Twenty-five thousand (25,000) dollars, absolutely, out of the share of principal producing her share of income, and her share of income shall be reduced to the extent of the amount of income said principal sum would have earned if it had continued as a part of the trust fund. In the event of the death of either of my daughters before the time fixed for the payment of the said legacy of Twenty-five thousand (25,000) dollars to her, the said sum shall remain as a part of the Trust created for her, with remainders over as herein declared.

IN TRUST, after the decease of either of my said daughters, to pay her share of the said net income to her children living at the time fixed for each quarterly distribution of income, after the decease of my said daughter,

or after my decease, if she predeceases me, and the issue living at each said quarterly period of any of my said daughter's children then deceased, until the death of my last surviving daughter, after which the corpus or principal of my residuary estate shall be distributed as hereinafter directed. In the event that either of my daughters dies leaving no descendants who shall live to share in the distribution of the income, as aforesaid, then the share of income of my daughter so dying shall fall into the share of income of my other daughter, with like remainders over, as herein provided with reference to her original share, until the time hereinafter fixed for the distribution of principal to take place;

In Trust, after the decease of the last survivor of my said two daughters, my Trustees shall assign, transfer and pay over the share of the corpus or principal producing, or which would have produced the share of income of my daughter Florence V. Stinson, to her children then living and the issue then living of any of her children then deceased, per stirpes, absolutely and in fee simple; and the share of corpus or principal of my said residuary estate which produced, or would have produced, the share of income of my daughter Nancy C. Stinson, to her children then living and the issue then living of any of her children then deceased, per stirpes, absolutely and in fee simple;

In Trust, if either of my said daughters leaves no descendants to survive to the time hereinabove provided for the distribution of principal to take place, then the entire principal of my said residuary estate shall be assigned, transferred and paid over to the children then living of my other daughter, and the issue then living of any of her children then deceased, per stirpes, absolutely and in fee simple;

In Trust, in the event that at the time of the decease

of the last survivor of my said two daughters there shall be no descendants of either of my daughters then living, then my said residuary estate shall continue in the hands of my Trustees, in Trust, and the net income therefrom shall be paid in equal shares to my brothers and sisters, James C. Workman, Mary W. Lincoln, Adelaide W. Denny and Robert A. Workman, for and during their respective lives, and upon the decease of each, or upon my decease, in the case of any of them who may predecease me, to assign, transfer and pay over the share of corpus or principal producing, or which would have produced the share of income of my brother or sister so dying, in equal shares, to The Presbyterian Hospital in Philadelphia, The Contributors to the Pennsylvania Hospital, The Philadelphia Home for Incurables and The Board of National Missions of the Presbyterian Church of the United States of America, for the general purposes of the said organizations, and to be known as "The Robert M. Stinson Memorial."

FIFTH: The share of income of my daughters, if they are minors at the time of my death, shall be applied by my Trustees towards their maintenance, education and support; the receipt of a duly appointed guardian or of such person as shall be selected by my Trustees to care for my daughters, shall be a sufficient acquittance to my said Trustees for payments so made.

The share of principal to which any minor shall be entitled hereunder, after the decease of my last surviving daughter, shall be held by my Trustees during minority, and the income therefrom shall be applied towards such minor's maintenance, education and support, the receipt of a parent, or duly appointed guardian, to be a sufficient acquittance to my Trustees for payments so made.

SIXTH: All principal and income of my Estate, while in the hands of my Executors and Trustees, so far as permitted by law, shall be free from the engagements, aliena-

tions and anticipations of legatees and beneficiaries, and from attachment, execution or sequestration, by any process, legal or equitable.

SEVENTH: All inheritance, federal estate and successi taxes shall be paid from the corpus of my residuary estate, so that all gifts of chattels and life estates hereunder shall be delivered, paid over and enjoyed without deduction for any such taxes.

EIGHTH: My Executors, during the settlement of my estate and my Trustees thereafter, in addition to the authority given them by law, shall have and exercise the following powers, viz:

(a) Power to retain any investments that I may leave, so long as they deem it advisable to do so, and to invest and reinvest, and such investments, as well as any that I may leave, to alter, vary and change at discretion; but I direct that in making investments and reinvestments of any funds which may become uninvested in my estate, my Trustees shall invest and reinvest in first mortgages on real estate in Philadelphia, or its vicinity, until at least fifty (50) per cent of the aggregate of the funds of my Estate and the funds of the Trust under my Deed, dated March 26, 1928, of which the Fidelity-Philadelphia Trust Company is Trustee, taken together, considering the two funds together for purposes of computation only, shall be so invested, after which said proportion, invested in such mortgages, shall be maintained. In the investment or reinvestment of the remaining portion of the funds of my Estate, which may become uninvested, however, my Trustees shall not be confined to what are known as legal investments, but I directed that no investments shall be made in common stocks.

(b) Power to exercise any option arising by reason of the ownership of any securities; to join in any plan of

reorganization, consolidation or merger, and to deposit securities thereunder, as well as under the terms of any voting trust agreement, and to otherwise delegate their discretionary powers as occasion shall arise and they shall deem it expedient to do so.

(c) Power to let and demise, alter and improve, partition and divide, and to sell, exchange and dispose of all real estate that may form part of my estate, selling at either public or private sale, for all cash, or part cash and part mortgage, or upon the reservation of ground rents, and the said ground rents, in turn to extinguish or assign, and good and sufficient title to the property so sold to make free and discharged of all trusts and without responsibility on the part of the purchasers to see to the application of the purchase money.

(d) In the event that at the time of my decease I own stock and/or voting trust certificates calling for stock of the Cincinnati, Hamilton and Dayton Corporation (which owns a controlling interest in the railway property now known as Cincinnati and Lake Erie Railroad Company) no sale shall be made of the said stock by my Executors and Trustees, or other action taken with reference to it, except with the approval of Dr. Thomas Conway, Jr. during his life. After his decease, my Executors and Trustees shall act with reference to the said stock as in their discretion they shall deem wise.

NINTH: I appoint my brother, Robert A. Workman, Guardian of my daughters, in the event that they, or either of them, are minors at the time of my decease. Should he predecease me, or die during my daughters' minority, I appoint my sister, Adelaide W. Denny, their Guardian.

TENTH: I nominate and appoint my brother, Robert A. Workman, and the Fidelity-Philadelphia Trust Company, Executors of this my Will. Should my said brother

predecease me, or die during the existence of any of the trusts hereunder, I nominate and appoint Dr. Thomas Conway as Co-Executor, and Co-Trustee, to act with the said Trust Company, and I expressly relieve my Executors of the necessity for entering security in any jurisdiction in which they may be called upon to act.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 6th day of June A. D. 1930.

ANNA C. STINSON (LS)

Signed, sealed, published and declared by the above named ANNA C. STINSON, as and for her last Will and Testament, in the presence of us, who at her request, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses:

A. E. Schmitz 135 S. Broad Street Phila., Pa.
E. Q. Holden " " " " " "

(Schedule of distribution of personal items not printed.)

EXHIBIT B.

THIS INDENTURE made in duplicate this 26th day of March A. D. 1928, between ANNA CHENEY STINSON, hereinafter called the Settlor, and the FIDELITY-PHILADELPHIA TRUST COMPANY, hereinafter called the Trustee, WITNESSETH:

THAT the said Settlor, for and in consideration of the trusts hereby assumed by the said Trustee as well as the sum of One Dollar lawful money to her in hand paid, the receipt whereof is hereby acknowledged, hath bargained, sold, assigned, transferred and set over and by these presents doth hereby bargain, sell, assign, transfer and set over unto the said Fidelity-Philadelphia Trust Company, its successors and assigns, all the securities, investments,

moneys, and other property set forth in the Schedule hereto annexed and made part hereof, designated as "Schedule A", and all her right, title, interest, property claim and demand of, in, and to the said property and every part thereof;

To Have and to Hold, receive and take the securities, investments, moneys, and other property hereby assigned or mentioned and intended so to be, together with any additional sum of money, securities or other property which may be transferred by the said Settlor to be held under the terms hereof, unto it, the said Fidelity-Philadelphia Trust Company, its successors and assigns, to and for its and their only proper use, benefit and behoof forever, subject, nevertheless, as to any Indenture of Mortgage which may at any time form part of the within created trust estate to the equity of redemption of the respective mortgagors therein.

In Trust, Nevertheless, to and for the following uses, intends and purposes;

In Trust to take, hold, manage and control and to invest and keep invested and the net income therefrom to pay at quarterly or other convenient periods to the said Settlor for and during all the term of her natural life, and at her death.

In Trust to pay the said net income, in equal shares, to Florence V. Stinson and Nancy C. Stinson, daughters of the said Settlor, during their respective lives.

In Trust, at the death of each daughter of said Settlor, to pay over the corpus or principal supporting such daughter's share of income to her then living descendants, per stirpes, absolutely.

In Trust, in the event of the decease of either daugh-

ter of said Settlor without leaving descendants surviving, to add the corpus or principal of such daughter's share to the share of the other daughter of said Settlor, if then living or to the then surviving descendants, per stirpes, of such other daughter if then dead, such descendants to take their deceased ancestor's share by representation; the share so accruing to a surviving daughter of said Settlor to be held upon the same trusts as her original share.

In Trust, in the event of the death of both daughters of said Settlor without leaving descendants surviving, to pay over the corpus or principal of the within created trust estate to such person or persons and upon such estate or estates as the said Settlor shall by her last Will and Testament direct, limit and appoint, and in default of such appointment then to assign, transfer and pay over the said corpus or principal of the within created trust estate to the Presbyterian Home for Aged Couples and Aged Men of the State of Pennsylvania, at Bala, Pennsylvania; the Presbyterian Orphanage in the State of Pennsylvania now located at Chester Avenue and Fifty-eighth Street in the City of Philadelphia; the Presbyterian Hospital now located at Thirty-ninth and Filbert Streets, Philadelphia; the Bryn Mawr College at Bryn Mawr, Pennsylvania, and the Philadelphia Home for Incurables now located at Forty-eighth Street and Woodland Avenue, Philadelphia, in equal shares absolutely.

The share of income to which the Settlor's children may be entitled hereunder during their minority shall be applied by said Trustee in its sole discretion toward their maintenance, education and support during such minority and the receipt of a duly appointed guardian of their persons shall be a proper acquittance to the said Trustee for income so paid and applied.

The share of principal to which any minor may be entitled hereunder, upon the termination of the trusts or any of them created hereby, shall be held by the said

Trustee during minority and the income therefrom shall be applied in the sole discretion of said Trustee, towards such minor's maintenance, education and support, the receipt of a parent or duly appointed guardian of the person to be a sufficient acquittance to the said Trustee for payments so made and upon the attainment of the age of twenty-one (21) years by any of the said minors, his or her share of the said principal shall be transferred, assigned and paid over. In the event of the decease of any of them before attaining the age of twenty-one years, his or her share of the said principal shall be transferred, assigned and paid over to the legal representative of said minor's estate.

The corpus or principal of the property hereby transferred and the income therefrom while in the hands of the said Trustee, to the fullest extent permitted by law, shall be free from the control, debts, liabilities and engagements of beneficiaries hereunder and shall not be subject to anticipation or assignment by them nor to execution or process, legal or equitable, for the enforcement of judgments or claims of any sort against them.

All inheritance, federal estate and succession taxes, if any shall be found to be payable, shall be paid from the corpus or principal of the trust estate, so that all life estates hereunder shall be paid over and enjoyed without deduction for any such taxes.

The said Trustee, in addition to any authority given it by law, shall have and exercise the following powers:

(a) Power to retain any investment which may at any time be assigned by the Settlor to the Trustee so long as it may deem it advisable to do so, and to invest and reinvest and investments so made, as well as any that may be assigned, to alter, vary and change at discretion, confining themselves, however, to securities sanctioned by law for investment by trustees, preference to be given to first mortgages on real estate in the State of Pennsylvania.

(b) Power to exercise any option arising by reason of the ownership of securities; to join in any plan of reorganization, consolidation or merger, and to deposit securities thereunder, as well as under the terms of any voting trust agreement and generally to delegate its discretionary powers as occasion shall arise and it shall deem it expedient to do so.

(c) Power to let and demise, alter and improve, partition and divide, and to sell, exchange and dispose of any real estate which may at any time form part of the within created trust estate, selling at either public or private sale for all cash or part cash and part mortgage or upon the reservation of ground rents and the said ground rents in turn to extinguish or assign and good and sufficient title to the property so sold to make free and discharged of all trusts and without responsibility on the part of purchasers to see to the application of the purchase money.

(d) Power to make all reasonable and necessary compromises.

(e) Power to apply income herein given to beneficiaries towards their maintenance and support should they for any reason through illness, accident or otherwise become mentally or physically unable to administer their own affairs or to receive and disburse the moneys payable to them hereunder.

It Is Hereby Declared by the said Settlor that she has been fully advised as to the legal effect of the execution of this Indenture and informed as to the character and amount of the property hereby transferred and conveyed; and, further, that she has given consideration to the question whether the settlement herein contained shall be revocable or irrevocable, and she hereby declares it to be irrevocable, and that it shall stand without power in her, the said Settlor, at any time to revoke, change or annul any of the provisions herein contained.

In Witness Whereof the said Settlor hath hereunto set her hand and seal the day and year first above written.

Anna Cheney Stinson (Seal)

Sealed and delivered
in the presence of

S. L. Gamble
A. E. Schmitz

We hereby accept the within created Trust.

Fidelity-Philadelphia Trust Company,
By: N. C. Denney
Vice-President
(Seal)

Attest:

H. L. McCloy
Secretary

(Schedule of assets omitted.)

EXHIBIT C.

Form 843
Treasury Department
Internal Revenue Service
Revised June, 1930

CLAIM

To be Filed with the Collector where Assessment was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

Collector's Stamp
(Date received)

Refund of Tax Illegally Collected.
Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

Abatement of Tax Assessed (not applicable to estate or income taxes).

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss:*

Type or Print

Name of taxpayer or purchaser of stamps—Estate of Anna C. Stinson, dec'd. c/o Fidelity-Philadelphia Trust Company, one of the executors

Business address—135 S. Broad Street, Philadelphia, Pa.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—1st District of Pennsylvania
2. Period (if for income tax, make separate form for each taxable year) from , 19 , to , 19
3. Character of assessment or tax—Estate Tax
4. Amount of assessment, $70,942.22; dates of payment—9/5/35 $53,386.59; 12/24/36 $17,555.63
5. Date stamps were purchased from the Government—
6. Amount to be refunded—$17,555.63 and interest from 12/24/36 $
7. Amount to be abated (not applicable to income or estate taxes)— $
8. The time within which this claim may be legally filed expires, under Section 319 (b) of the Revenue Act of 1926, on December 24, 1939.

The deponent verily believes that this claim should be allowed for the following reasons:
See attached sheets (part thereof relating to other matters not printed)

FIDELITY-PHILADELPHIA TRUST COMPANY,

(Attach letter size sheets if space is not sufficient)
Signed By: H. C. Haines,
Asst. Secy.

Sworn to and subscribed before me this 15th day of November, 1939.

N. S. AITKEN,

(Signature of officer administering oath,
Notary Public 2/19/41
(Title)
(See Instructions on Reverse Side)

Treasury Department
Washington
Oct. 29, 1936

MT-ET-CI-10888-1st Pennsylvania
Estate of Anna C. Stinson
Date of death—November 17, 1934
Fidelity-Philadelphia Trust Company, et al, Executors,
135 S. Broad Street,
Philadelphia, Pa.

Sirs:

A deficiency of $32,078.16 in the Federal estate tax liability of the above named estate has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency

and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308(a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890 has not been submitted, the deficiency will be thereafter assessed.

Respectfully,

GUY T. HELVERING,
Commissioner

By: D. S. BLISS,
Deputy Commissioner

Enclosures:

Statement,
Waiver, Form 890.
MT-ET-CI-10888-1st Pennsylvania
Estate of Anna C. Stinson
Date of death—November 17, 1934.

STATEMENT

The estate's protest is directed against the following:

GROSS ESTATE

Stocks and Bonds	*Returned*	*Tentatively Determined*	*Determined*
Item 38	$9,300.00	$9,387.50	$9,300.00

After further consideration of the valuation of the foregoing item, adjustment to the returned value is deemed warranted.

Insurance

Proceeds under annuity contracts with the Equitable Life Assurance Society of the United States	0.00	25,703.63	0.00

The matter referred to in the protest under this heading has been transferred to Schedule E for consideration.

Transfers

Proceeds under annuity contracts with the Equitable Life Assurance Society of United States (transferred from Schedule C-2)	0.00	0.00	25,703.63

It appears that at the date of her death the decedent owned three annuity contracts with the Equitable Life Assurance Society of United States. The annuity under said contracts was to be paid to the decedent during her lifetime and upon her death any refund was to be paid to her daughters. Under the facts it does not appear that the annuity contracts come within the classification of life insurance. The contracts, therefore, are not governed by any rules applicable to life insurance. In the opinion of this office the contracts represent a transfer of property by the decedent in contemplation of and intended to take effect in possession and enjoyment at or after her death within the meaning of Section 302(c) of the Revenue Act of 1926, as amended. Consequently, the proceeds of the said annuity contracts as of the date of the decedent's death are deemed properly includible for estate tax under Schedule E.

Net value of property held by the Fidelity-Philadelphia Trust Company under trust agreement dated March 26, 1928	0.00	84,433.49	84,433.49

An examination of the trust agreement executed on March 26, 1928 discloses that the decedent retained therein the right to the income for life and the right to designate the person or persons who shall possess or enjoy the corpus of the trust in the event of the decedent's daughters die without leaving descendants surviving. Accordingly, the net value of the property comprising the trust is included in the gross estate in accordance with the provisions of Section 302(c) of the Revenue Act of 1926, as amended by Section 803 of the Revenue Act of 1932.

Other Miscellaneous Property	*Returned*	*Tentatively Determined*	*Determined*
Item 8	$1,600.00	$2,200.00	$1,600.00

The inclusion of the Lincoln sedan limousine at the sale price is deemed warranted, and adjustment is made accordingly.

In view of the foregoing the following computation shows the Federal estate tax liability of this estate which is hereby made final:

Gross estate		$662,527.21
Deductions (1926 Act)		125,587.75
Net estate (1926 Act)		538,939.46
Net estate (1934 Act)		558,939.46
Gross tax (1926 Act)		19,446.97
Credit for estate or inheritance tax		0.00
Net tax (1926 Act)		19,446.97
Total gross taxes (1926 & 1934 Acts)		85,498.50
Gross tax (1926 Act)		19,446.97
Additional tax		66,051.53
Net tax (1926 Act)		19,446.97
Total net tax		85,498.50
Net tax shown on the return	$53,386.59	
Amount assessed as deficiency pursuant to waiver	33.75	
		53,420.34
Deficiency		$32,078.16

Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter, if a petition is not filed with the Board of Tax Appeals, $16,520.58 of the deficiency will be assessed. As the balance of the deficicency may be eliminated by credit for State or Territorial estate, inheritance, legacy or succession taxes, opportunity will be

accorded for the submission of the evidence required by Article 9 or Estate Tax Regulations 80. If after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the submission of this evidence may be expected.

The deficiency bears interest at the rate of six per cent per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

EXHIBIT D.

Treasury Department
Internal Revenue Service
Philadelphia, Pa.

Office of
Internal Revenue Agent in Charge
Room 1200 Gimbel Building
Philadelphia Division February 23, 1940
MT-ET-10888
Estate of Anna C. Stinson
Date of Death—November 17, 1934
First District of Pennsylvania
Mr. H. C. Haines,
Assistant Secretary,
Fidelity-Philadelphia Trust Company,
135 S. Broad Street,
Philadelphia, Pa.

Dear Mr. Haines:

In connection with the Claim for Refund filed in the above-entitled estate, I shall recommend that the interest received of $211.70 on the annuity contracts be eliminated from the Gross Estate, as well as the value of the property transferred in trust on March 26, 1928.

The above recommendations result in an Overassessment of $12,696.78, computed as follows:

Gross Estate—as per Bureau Letter dated 10/29/36			662,527.21
Less: Recommended Adjustment—Schedule C-2		211.70	
" " " E		84,433.49	84,645.19
Gross Estate—			577,882.02
Deductions—1926 Act			123,587.75
Net Estate—1926 Act			454,294.27
Net Estate—1934 Act			504,294.27
Gross Tax—1926 Act			15,214.71
Credit for Estate and Inheritance Taxes			12,171.77
Net Tax—1926 Act			3,042.94
Total Gross Taxes—1926 and 1934 Acts			69,415.91
Gross Tax—1926 Act			15,214.71
Net Additional Tax—1934 Act			54,201.20
Total Net Tax			57,244.14
Returned Tax		53,386.59	
Amount assessed as deficiency pursuant to waivers	33.75		
	16,520.58	16,554.33	69,940.92
Overassessment			12,696.78

The enclosed Acceptance should be properly executed and promptly returned.

Very truly yours,

JAMES J. CLORAN
Internal Revenue Agent.

JJC:M
Encl.

3. ANSWER.

Now comes the defendant, Walter J. Rothensies, individually and as Collector of Internal Revenue for the First District of Pennsylvania, by Gerald A. Gleeson, United States Attorney, and for answer to the plaintiffs' complaint filed herein specifically denies each and every allegation of fact alleged in said complaint which is not admitted, qualified or denied in this answer, and, for further answer to the said complaint the defendant says:

1. Defendant admits the allegations of fact contained in paragraphs 1, 3, 4, 5, 6, 7, 8 and 13 of the said complaint.

2. Defendant admits the allegations of fact contained in paragraph 2 of the said complaint, except that the defendant denies that the estate taxes referred to in said paragraph were "erroneously" paid to the defendant, and further answering said paragraph, the defendant says that all of the estate taxes referred to in said paragraph 2 were lawfully assessed by the Commissioner of Internal Revenue and legally collected by the defendant.

3. Answering paragraph 9 of the said complaint, the defendant admits that the organizations and institutions therein mentioned were in existence upon the date of the decedent's death, and still are in existence, and have capacity to take and receive gifts and bequests. Further answering said paragraph 9, the defendant says that all other statements therein contained are conclusions of law as to which the defendant is not required to make reply in this answer, and that to the extent that any or all of such other statements are or may be considered to be allegations of fact they are denied.

4. Answering paragraph 10 of the said complaint, the defendant says that the statements therein contained are conclusions of law as to which the defendant is not required to make reply in this answer.

5. Answering paragraph 11 of the said complaint, the defendant says that the statements therein contained are conclusions of law as to which the defendant is not required to make reply in this answer, and that to the extent that any or all of said statements are or may be considered to be allegations of fact they are denied.

6. Answering paragraph 12 of the said complaint, the defendant says that the statements therein contained are conclusions of law as to which the defendant is not required to make reply in this answer, and that to the extent that any or all of said statements are or may be considered allegations of fact they are denied.

7. Defendant asks that paragraph 14 of the said complaint be stricken therefrom as being wholly irrelevant and immaterial to any issue tendered by the complaint, and prejudicial to the rights of the defendant; that the facts alleged in said paragraph 14, if true, should not and cannot properly be considered in determining any issue tendered by the said complaint; that no evidence proving or tending to prove the facts alleged in said paragraph 14 would be admissible upon the trial of any issue tendered by the said complaint, and, therefore, the allegations in said paragraph 14 are improper and should be expunged from the said complaint.

8. The allegations of fact contained in paragraph 15 of the said complaint are denied. Further answering said paragraph 15, the defendant says that the claim for refund which was filed by the plaintiffs on or about November 22, 1939, contended that a refund of estate taxes in the sum of $17,555.63 was due the plaintiffs on three different

grounds, one of which is the ground upon which recovery is sought in the present action and another of which was that the Commissioner of Internal Revenue had included in the value of the taxable estate the sum of $211.70 representing certain interest received by the beneficiaries of the estate which interest should not have been included therein; that after consideration of the claim for refund the Commissioner allowed the plaintiffs' contention relative to the interest item aforesaid but denied its other two contentions, including the contention now made in the present action; that, thereafter, on May 3, 1941, a certificate of overassessment in the amount of $33.68 was issued to the plaintiffs as a result of the allowance of their contention relative to the interest item, as aforesaid, and this amount, together with $8.93 interest thereon, was refunded to the plaintiffs; that, in a letter dated May 3, 1941, the Commissioner advised the plaintiffs that their claim for refund aforesaid was rejected except to the extent and in the amount allowed as an overassessment of tax in the certificate of overassessment above mentioned.

9. Further answering the said complaint, and as a separate defense to the alleged cause of action therein stated, the defendant says that the transfers of property by the plaintiffs' decedent on March 26, 1928 and May 31, 1928, mentioned in paragraph 5 of the said complaint, to the trust created by the plaintiffs' decedent by deed dated March 26, 1928, were transfers in trust intended to take effect in possession or enjoyment at or after the plaintiffs' decedent's death.

10. Further answering said complaint, and as a separate defense to the alleged cause of action therein stated, the defendant says that the transfers of property by the plaintiffs' decedent on March 26, 1928, and May 31, 1928, mentioned in paragraph 5 of the said complaint, to the trust created by the plaintiffs' decedent by deed dated

March 26, 1928, were transfers made in contemplation of death within the meaning of the Internal Revenue statutes.

Wherefore, the defendant asks that the plaintiffs' complaint be dismissed and that the defendant be allowed his costs herein.

THOMAS J. CURTIN,
Assistant United States Attorney
GERALD A. GLEESON,
United States Attorney.

4. STIPULATION OF AGREED FACTS.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys of record, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the rights of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true.

I.

Anna C. Stinson died November 17, 1934, a resident of Bryn Mawr, Pennsylvania. On September 5, 1935, the executors of her estate filed a Federal estate tax return showing a gross estate of $552,165.09, claiming deductions (exclusive of the specific exemption of $100,000 under the

Revenue Act of 1926, and of $50,000 under the Revenue Act of 1932, as amended) in the amount of $23,587.75 resulting in a net estate of $428,577.34 for tax imposed by the Revenue Act of 1926, and a net estate of $478,577.34 for tax imposed by the Revenue Act of 1932, as amended, and a total net tax of $53,386.59 after claiming a credit of $11,143.10 on account of state inheritance taxes. The returned tax of $53,386.59 was paid by the executors on September 5, 1935.

II.

Subsequently, a tentative audit and review of this return was made by the Commissioner of Internal Revenue, the result of which was set forth in a letter directed to the executors under date of September 1, 1936. In this tentative audit the gross estate was determined to be $663,214.71. Deductions (exclusive of the specific exemption) were allowed in the sum of $23,587.75 (as reported in the estate tax return), resulting in a net estate of $539,626.96 for tax imposed by the Revenue Act of 1926 and a net estate of $589,626.96 for tax imposed by the Revenue Act of 1932, as amended, and a total net tax of $85,629.12. No credit for state inheritance taxes was allowed in this tentative audit. Inasmuch as a tax of $53,386.59 was paid on the basis of the estate tax return, the deficiency in tax was tentatively determined to be $32,242.53.

III.

A protest was filed by the executors against the tentative findings of the Commissioner, and, after giving consideration to the contentions advanced by the representatives of the estate, a final audit was made by the Commissioner, the result of which was set forth in a letter directed to the executors under date of October 29, 1936. In this final audit, the gross estate was determined to be $662,527.21. Deductions (exclusive of the specific exemption) were allowed in the sum of $23,587.75 (as reported

in the estate tax return), resulting in a net estate of $538,939.46 for tax imposed by the Revenue Act of 1926, and a net estate of $588,939.46 for tax imposed by the Revenue Act of 1932, as amended, and a total net tax of $85,498.50. No credit for state inheritance taxes was allowed in this final audit. Since a tax of $53,386.59 was paid on the basis of the estate tax return, and a tax of $33.75 was assessed pursuant to a waiver filed by the executors, making a total payment of $53,420.34, the deficiency in tax was finally determined to be $32,078.16.

IV.

Subsequent to the mailing of the final audit letter of October 29, 1936, the executors submitted evidence entitling the estate to a credit of $15,557.58 on account of state inheritance tax payments. This credit of $15,557.58 was allowed by the Commissioner, as shown by letter directed to the executors under date of December 7, 1936. The allowance of this credit reduced the amount of the deficiency assessment of tax from $32,078.16 to $16,520.58. This deficiency tax of $16,520.58, plus interest thereon in the amount of $999.38, making a total of $17,519.96 was paid by the executors on December 24, 1936. The sum of $33.75, plus interest in the amount of $1.92, or a total of $35.67 paid pursuant to a waiver was paid by the executors on the same date.

V.

On November 24, 1939, the executors filed a claim for refund of $17,555.63, the claim being based upon the following contentions:—

(1) That the Commissioner of Internal Revenue erroneously included as part of this decedent's statutory gross estate the value of the corpus of a trust created by the decedent on March 26, 1928.

(2) That the Commissioner erroneously included

as part of the decedent's statutory gross estate the amount of the proceeds of certain annuity policies; and

(3) That even if the proceeds of these policies are taxable the interest received by the beneficiaries on the amount due from the date of the decedent's death to the date of payment in the amount of $211.70 should not be included in the taxable estate.

VI.

In acting on the claim for refund, the Commissioner excluded from the decedent's statutory gross estate the interest amounting to $211.70, this being the third contention made under the claim for refund. The Commissioner, however, denied the other contentions made by the executors. Under date of May 3, 1941, the Commissioner issued a certificate of overassessment showing an overpayment of $33.68, resulting from the exclusion of the interest item of $211.70. This overpayment of $33.68, plus interest thereon in the sum of $8.93 was refunded to the executors, and the Commissioner advised the executors that as to the balance claimed the claim for refund was disallowed.

VII.

On March 26, 1928, the decedent executed a deed of trust transferring certain property to the Fidelity-Philadelphia Trust Company as trustee to be held and administered as provided by the terms of the trust indenture. A copy of the trust indenture is attached to the plaintiffs' complaint as "Exhibit B". The value of the corpus of this trust as of the date of the decedent's death was $84,433.39. This trust was disclosed by the executors under "Schedule E Transfers" of the estate tax return, but the value of the corpus was not included for tax.

VIII.

On November 17, 1934, the date on which the decedent died, she was survived by two living daughters (who were unmarried at the time of decedent's death), whose names are now Florence Valleau Whitridge and Nancy Chaney Day. Her daughter Florence Valleau Whitridge was born February 22, 1916, and her daughter Nancy Chaney Day was born December 9, 1917.

According to the mortality tables customarily used the value on the date of decedent's death of a remainder after the death of the survivor of two persons of the age of decedent's two daughters was $0.14030 for each $1 principal value on that date, which, applied to the $84,433.49 value of principal in the trust would give $11,846.02 as the value of a remainder interest therein on the date of decedent's death, after the death of the survivor of her two daughters.

IX.

The Presbyterian Hospital in Philadelphia, The Contributors to the Pennsylvania Hospital, The Philadelphia Home for Incurables, and The Board of National Missions of the Presbyterian Church of the United States of America, named in the residuary clause of the will of Anna C. Stinson, copy of which will is attached to plaintiffs' complaint as "Exhibit A", are and, at the date of the decedent's death, were corporations organized and operated exclusively for religious, charitable or scientific purposes within the meaning of Section 303 of the Revenue Act of 1926 as amended by the Revenue Act of 1934, and the Regulations promulgated thereunder as the Act and Regulations stood on the date of the decedent's death, and no part of the net earnings of any of them inures to the benefit of any private stockholder or individual and no part of the activities of any of them is carrying on propaganda or otherwise attempting to influence legislation, and in addition, The Presbyterian Home for Aged Couples and

Aged Men of the State of Pennsylvania, The Presbyterian Orphanage in the State of Pennsylvania and Bryn Mawr College, mentioned in the trust indenture of March 26, 1928, Exhibit B of the complaint, are and, at the time of the decedent's death, were corporations organized and operated exclusively for religious, charitable, scientific or educational purposes, within the meaning of Section 303 of the Revenue Act of 1926 as amended by the Revenue Act of 1934 and the Regulations promulgated thereunder as the Act and Regulations stood on the date of the decedent's death, and no part of the net earnings of any of them inures to the benefit of any private stockholder or individual and no part of the activities of any of them is carrying on propaganda or otherwise attempting to influence legislation.

C. RUSSELL PHILLIPS,
Attorney for the Plaintiffs.
GERALD A. GLEESON,
THOMAS J. CURTIN,
Attorneys for Defendant.

5. TRANSCRIPT OF THE TRIAL RECORD.

THE COURT: All right, gentlemen.

Are there any pleadings that can be admitted under the answer?

MR. PHILLIPS: Yes, sir, we have stipulated a great many of the facts, but on the chance that it may be helpful to Your Honor I have prepared a little trial brief (producing same).

THE COURT: Yes, it would be helpful.

MR. PHILLIPS: This is an action to recover a Federal estate tax which was paid on the estate of Anna C. Stinson, who died November 17, 1934.

On March 26, 1928, she created a trust, and put into the same securities which on the day of her death were worth $84,000—I have the exact figures in the stipulation—and these securities, or rather, the principal of the trust was not included in her estate tax returned, but a note of the facts was made on the return, and the Government contends that the principal of the trust should be included in gross estate for estate tax purposes. That was done, and the tax paid, and this suit was brought to recover the tax.

There are two reasons given for that contention; the Government contends that the trust was made in contemplation of death—

THE COURT: How many months before death was the trust created?

MR. PHILLIPS: It was six and a half years.

THE COURT: She died in 1934?

MR. PHILLIPS: November 17, 1934. She was forty-five when she made the trust, and fifty-one when she died.

The other reason that the Government cites in this let-

ter to us is that the trust reserves a remainder to this woman's estate, and that under the Hallock decision the Government contends it is taxable. That makes it important to look at the terms of the trust. While it is a long trust, its terms are clear.

(Opening statements of counsel to the Court.)

MR. PHILLIPS: If Your Honor please, both sides have agreed on many of the facts here in a stipulation, which I offer in evidence. (Producing same.)

THE COURT: It may be received.

(Stipulation of Agreed Facts referred to was received in evidence and is filed with these proceedings.)

MR. PHILLIPS: Now, there are a number of admissions which are covered by the pleadings. There are a number of formal admissions.

Paragraph 1 of the complaint, I offer in evidence, it is simply the identification of the parties, and I do not think I need to read it to the stenographer.

MR. COOPER: Those are all the paragraphs that have been admitted?

MR. PHILLIPS: Yes.

(Paragraph 1 of the Complaint reads as follows:

"1. Fidelity-Philadelphia Trust Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania having a place of business at 135 S. Broad Street, Philadelphia. Robert A. Workman is a citizen of the United States residing at 426 Montgomery Avenue, Haverford, Pennsylvania.").

MR. PHILLIPS: I offer in evidence paragraph 2 of the complaint except that portion—or, rather, let me say, that the phrase "to recover estate taxes erroneously paid", the

Government denies the erroneousness of it, but admits what the action is about, and I offer in evidence paragraph 2 of the complaint except for the word "erroneously".

(Paragraph 2 of the Complaint reads as follows:

"2. The defendant, Walter J. Rothensies, at the times herein referred to was and is the Collector of Internal Revenue for the First District of Pennsylvania and resides in the Eastern Judicial District of Pennsylvania. This is a suit of a civil nature to recover estate taxes erroneously paid to the defendant and is upon a cause of action arising under the Internal Revenue Laws of the United States."

Paragraph 2 of the Answer reads as follows:

"2. Defendant admits the allegations of fact contained in paragraph 2 of the said complaint, except that the defendant denies that the estate taxes referred to in said paragraph were 'erroneously' paid to the defendant, and further answering said paragraph, the defendant says that all of the estate taxes referred to in said paragraph 2 were lawfully assessed by the Commissioner of Internal Revenue and legally collected by the defendant.")

Mr. Phillips: I offer in evidence paragraph 3 of the complaint which refers to the will, and I also offer in evidence the decedent's will, which is Exhibit A attached to the complaint.

(Paragraph 3 of the Complaint reads as follows:

"3. Anna C. Stinson died November 17, 1934, a citizen of the United States, residing at Morris and Yarrow Avenues, Bryn Mawr, Montgomery County, Pennsylvania, leaving a will dated June 6, 1930 which was on November 22, 1934 duly admitted to probate

by the Register of Wills of Montgomery County, Pennsylvania. A copy of said will is hereto attached, made a part hereof and marked 'Exhibit A'. On November 22, 1934 letters testamentary were granted by said Register to plaintiffs, Fidelity-Philadelphia Trust Company and Robert A. Workman, and the said plaintiffs became and are executors of the estate of said decedent.")

Mr. Phillips: I offer in evidence paragraph 4 of the complaint which refers to the trust, a copy of which is attached as Exhibit B to the complaint, and which I also offer in evidence.

(Paragraph 4 of the Complaint reads as follows:

"4. On March 26, 1928 the said decedent made, executed and delivered a certain trust indenture, a copy whereof is hereto attached, made a part hereof and marked 'Exhibit B.')

Mr. Phillips: Mr. Workman, will you take the stand, please.

Robert A. Workman, having been duly sworn was examined and testified as follows:

Direct-examination.

By Mr. Phillips:

Q. Mr. Workman, you are a brother of Mrs. Stinson, I believe?

A. Yes, sir, I am.

Q. And you knew her intimately, I suppose?

A. Very.

Q. You knew of this trust on March 26, 1928?

A. I did.

Q. Will you tell us the circumstances surrounding its creation and why it was done as far as you know.

A. Mrs. Stinson relied on my advice in matters of investment—

Q. She was a widow, I believe?

A. She was a widow.

And after investing in Government bonds, in Municipal bonds, and Federal Land Bank bonds, as a matter of diversification I advised Mrs. Stinson to create this trust. As a matter of fact, it had never occurred to her to do so unless I had brought it to her attention. I had had some experience with my mother's account, and was so pleased by the way the Trust Company handled the account that I created a deed of my own with a small trust, with the same Company; and as a matter of diversification of capital I advised her to do so.

Q. Just about how much in the way of securities was put in this trust at that time?

A. The total sum was $100,000.

Q. What proportion, approximately, of her means went into the trust?

A. At that time I should say approximately one-seventh.

Q. Was the trust added to subsequently?

A. No

MR. COOPER: I didn't get your previous answer.

THE WITNESS: Approximately one-seventh, at the time it was created.

By MR. PHILLIPS:

Q. Did she have any other trust that you know of?

A. No, sir.

Q. Now, tell us what you did after you gave this advice to her, who did you go to see, and how did you go about it?

A. I took her to the old Philadelphia Trust Company into the office of N. C. Denny, and told him that I brought Mrs. Stinson in to create a trust similar to mine.

Q. What happened,—was a draft prepared and so on?

A. He got all the notes that Mrs. Stinson had made out, and then a draft was made and a copy was sent to me at the same time that a copy was sent to Mrs. Stinson; then there were a few corrections made and the final draft was drawn.

Q. Were you present when the trust was signed and the securities turned over?

A. I was.

Q. And that occurred on the date of the instrument, I suppose?

A. That was signed and witnessed sometime in March.

Q. Do you have any reason or know of anything that would indicate that Mrs. Stinson may have made that trust in expectation or contemplation of death?

A. Absolutely no reason. It was on my advice entirely.

Q. How old was she at that time?

A. In 1928?

Q. Yes.

A. She was born in 1883,—forty-five.

Q. Was she in good health then?

A. In excellent health.

Q. Did you know her intimately and live near her and see often?

A. I lived within a mile of her residence.

Q. Do you know of any illness she had had around that time?

A. No illness

Q. Or if she had any pain?

A. No illness that I know of.

Q. Would you have likely known of it if she had?

A. I would have known had she been ill.

By The Court:

Q. With whom did she live?

A. She lived with her two daughters.

Q. She was a widow at the time?

A. She was a widow and lived with her two daughters in Bryn Mawr.

By Mr. Phillips:

Q. How did her husband die?

A. Her husband was horseback riding and was thrown from his horse in Allen Lane, and thrown on a rock and fractured his skull and died within a few hours.

Q. What about the other members of her family? She mentioned four brothers and sisters in her will,— James C. Workman, when was he born?

A. James C. Workman, March 29, 1868.

Q. Is he living now?

A. He is still living.

Q. That would make him about seventy-three, then?

A. He will be seventy-four in March, yes, sir.

Q. And Mary W. Lincoln, when was she born?

A. January 29, 1872.

Q. Is she living?

A. She is living.

Q. And Adelaide W. Denny, when was she born?

A. August 30, 1873.

Q. And yourself?

A. I was born October 7, 1877.

Q. Now, have there been any brothers or sisters who died?

A. No, sir; there were just the five of us.

Q. How old was her mother when she died?

A. Her mother was eighty-two when she died.

Q. And her father?

A. Her father was in his seventy-first year.

Q. So that the family was reasonably long lived?

A. Yes, sir.

Q. Now, the family, I think, you said consisted of the two daughters, and I suppose the servants,—they lived together in the home or residence?

A. Yes, sir.

Q. What kind of a residence was it? Was it a house and grounds, or was it a city residence?

A. It was a house with about an acre and a half or an acre and three-fourths of ground.

Q. Do you know whether she looked after the management of that place?

A. She did.

Q. Were you often at the home and in a position to observe?

A. I was there very frequently.

Q. Was she an active person socially?

A. Most active socially.

Q. Did she go away in the summer time? What did she do with her time?

A. She went to Maine nearly every summer. I say "nearly" because in 1930 they went abroad.

Q. Who went with her?

A. Her two daughters.

Q. She took them along?

A. Yes, sir.

Q. And they were how old? Tell us when they were born, if you recall.

A. Florence, the oldest girl, was born February 22, 1916.

Q. And Nancy?

A. On December 1, 1917. I think Nancy was about twelve years old then.

Q. And the other about fourteen. I suppose?

A. Yes, sir, fourteen.

Q. And she went abroad with those two children?

A. She did.

Q. In 1930?

A. Yes, sir.

Q. Did she take any servants along or any help to look after the children?

A. No, she didn't take any servants. She did take a very intimate friend with her.

Q. How long were they gone?

A. I think they were gone about three months. At least three months.

By The Court:

Q. Did she supervise or manage the household?

A. Yes, sir.

Q. She was active every day?

A. Active every day.

By Mr. Phillips:

Q. By the way, do you know of any illness of Mrs. Stinson after the creation of the trust?

A. She had no illness after the creation of the trust until the summer she died.

Q. That would be in 1934?

A. That is in 1934.

Q. What happened then, if you recall?

A. She was in Maine, and she had an attack of tonsillitis. That was in September. That is the only illness I know she had.

Q. Now, what was done about that, do you know?

A Well,—

Q. Did she have a doctor?

A. She had a physician.

Q. Who was—

A. Dr. Lincoln.

Q. Who is Dr. Lincoln?

A. Dr. Lincoln is my brother-in-law. He married my oldest sister, and it was at his cottage in Maine that she was staying at the time.

Q. That was about September of the year she died?

A. In 1934.

Q. Did she recover?

A. Yes, she recovered.

Q. How did she get back,—did she come back home?

A. Her eldest daughter had a "coming out" in the latter part of September, and she came home for that event.

Q. Do you know whether she supervised the preparation for that event?

A. Yes, she did.

Q. Would you know whether that is a picture of her on that occasion? (Producing same)

A. That is the last photograph that she had taken in the home at the time Florence came out.

Q. That was in the fall of 1934, about when?

A. I should say in the latter part of September. I do not remember the exact date.

Q. She had apparently recovered then?

A. She had.

Q. As far as you could see?

A. Yes, sir.

By The Court:

Q. When was this taken, about,—the fall of when?

A. 1934,—it was taken before the coming out of Miss Florence.

Q. And she died in November?

A. She died in November. Just two months after this coming out.

Q. Two months after?

A. Just about two months, she died on November 17, 1934.

Mr. Phillips: Cross-examine.

Cross-examination.

By Mr. Cooper:

Q. Mr. Workman, do you know how much property your sister owned at the time she made this trust?

A. I should say about $750,000, including the home in which she lived.

Q. Do you know what kind of property it was, whether it was securities, real estate, or—

A. Yes, yes. I recommended most of the securities she bought, and also was at the settlement of the house she purchased in Bryn Mawr.

Q. Was most of this $700,000 in securities?

A. It was all in securities except the home in Bryn Mawr.

Q. And the trust, you estimated at the time it was created was—

A. She paid to the Fidelity-Philadelphia Trust Company $100,000 in securities and cash.

By The Court:

Q. Roughly, would you say the securities in cash amounted to $700,000 and the real estate $50,000? I think that is what counsel is getting at. I think you said that about one-seventh of the estate was in this trust. Now, one-seventh would be $50,000 in real estate and $100,000 in securities and cash.

A. $65,000 she paid for the real estate.

By Mr. Cooper:

Q. So that the whole estate would be about $765,000, of which $65,000 represented real estate and about $700,000 in securities?

A. Yes.

Q. And the trust with which we are concerned was created in March, 1928, and represented about $100,000 of the securities?

A. That is correct.

Mr. Cooper: Thank you, sir, that is all.

Mr. Phillips: That is all.

By The Court:

Q. By the way, Mr. Workman, she went to Maine each year for a vacation?

A. Yes, sir.

Q. How many years had she been going to Maine?

A. She started going to Sargentville when she was attending Bryn Mawr College—that was the reason for her going there. Then she took her children there also.

The Court: All right.

Mr. Phillips: Miss Schmitz.

Augusta E. Schmitz, having been duly sworn was examined and testified as follows:

Direct-examination.

By Mr. Phillips:

Q. Miss Schmitz where are you employed?

A. Fidelity-Philadelphia Trust Company.

Q. What was your position there in 1928?

A. I was secretary to Mr. Denny, one of the vice-presidents.

Q. Do you recall Mrs. Stinson coming there?

A. I do.

Q. You knew her?

A. Yes, I knew her.

Q. Your name is on this trust as one of the witnesses, is that correct?

A. Yes, sir.

Q. And you are that person?

A. Yes, sir.

Q. Mr. Denny is dead now?

A. Yes, he is dead.

Q. Do you recall the preparation of this trust in any way? Do you have your file copy of it there?

A. I have one of the copies.

Q. This is from your file at the Fidelity-Philadelphia Trust Company?

A. Yes, it is.

Q. Whose handwriting is this on this note attached to this draft?

A. Mr. Denny's handwriting.

Q. And that is the draft of this trust?

A. Yes, it is.

THE COURT: How much factual testimony will you have with respect to the contemplation of death here? I did not hear any cross-examination of Mr. Workman, and accordingly it is undisputed that she was in good health, going to Maine during part of the vacation, and the ordinary routine of living.

MR. COOPER: I have no witnesses on that, if your Honor please.

THE COURT: If it is not going to be denied actually, there is no use taking a great deal of time on it.

MR. COOPER: I do not think there is any doubt about her being apparently in good health.

MR. PHILLIPS: This is a matter of fact, and I think the evidence that we have is conclusive on that subject. But in the absence of some agreement I think that I have to put my evidence in because the Government has raised that issue.

THE COURT: I know that it ought to go in because that question has been raised. I am addressing my question to counsel, as to whether we need all of the factual testimony if it is not to be contradicted?

MR. PHILLIPS: I can state what evidence we have if—

THE COURT: Is there any doubt about it?

MR. COOPER: I do not know. I do not know what the facts are. I have no information one way or the other.

THE COURT: You do not deny it?

MR. COOPER: Because we do not know.

THE COURT: All right. I suppose that you better put it in.

MR. PHILLIPS: In order that you may understand what I am putting in here, your Honor, the first draft of this trust does not contain this reverter on which the Government relies. The pencil memorandum written by Mr. Denny shows that he must have suggested it, as it is in the last draft.

The witness has identified these papers, and therefore I offer them in evidence for the purpose of making that point. It has nothing to do with the contemplation of death. There are a series of witnesses here on that point, but this witness is here now and I should like to make that point now.

THE COURT: What is the purpose of this testimony, to show what?

MR. PHILLIPS: To show that the reverter interest, or reservation of the power to appoint by will in the event that the whole family dies out was put in by a note in Mr. Denny's handwriting. In other words, Mr. Workman did not originate that or make that suggestion,—it is a very minor point.

MR. COOPER: I object to this going in. I think that the instrument that was finally instituted is the only one to be considered.

THE COURT: All right, we will take it subject to the objection. The objection is overruled.

By Mr. Phillips:

Q. That handwriting on that draft is Mr. Denny's handwriting?

A. Yes, it is.

Mr. Phillips: That is Plaintiff's Exhibit—

(The document referred to was marked Plaintiff's Exhibit 2, and is filed with these proceedings.)

By Mr. Phillips:

Q. What kind of person was Mrs. Stinson when you saw her,—did she ever come in on crutches or—

A. No.

Q. What kind of a person was she when you observed her?

A. She appeared to be a person who was very well, very cheerful in disposition and very friendly.

Q. Did you have occasion to chat with her?

A. Frequently.

By The Court:

Q. Do you remember this particular occasion of her coming?

A. Yes, I remember her coming before she signed the deed of trust.

Mr. Phillips: Cross-examine.

Mr. Cooper: No cross-examination.

Mr. Phillips: That is all.

Mr. Phillips: I would like to interrupt the natural sequence of my witnesses here because I have another witness who has come out at some trouble to himself, an actuary, and I would like to put him on the stand?

THE COURT: All right.

MR. PHILLIPS: Mr. Hendrickson.

JAMES HENDRICKSON, having been duly sworn was examined and testified as follows:

Direct-examination.

By MR. PHILLIPS:

Q. What is your business?
A. Actuary.

THE COURT: By the way, how was this to end?

MR. PHILLIPS: After Mrs. Stinson's death the income was to go to the daughters, and as each daughter died the principal was to go absolutely to her issue, which would be the grandchildren of Mrs. Stinson, and if the first one died without children it would go to the other children.

MR. COOPER: And if both daughters predeceased their mother the estate was to be disposed of as she directed in her will.

MR. PHILLIPS: If the daughters died without surviving issue it was to go as she might want in the will. Testimony will be produced to show the value of that remainder under these circumstances.

Paragraph VIII of the stipulation provides that the value of a remainder after the death of the survivor of the two girls at their age was 14.03 cents on the dollar. In other words, if you had a dollar of principal the value of the remainder to the two girls as of that age at the death of Mrs. Stinson would be 14.03 cents.

MR. COOPER: Upon our theory of the case this testimony would be irrelevant because we think the decision in the Hallock case makes this unnecessary and upon that theory I am objecting to all testimony by this expert.

THE COURT: I will take it subject to your objection.

By MR. PHILLIPS:

Q. What is your business?

A. Actuary.

Q. By whom are you employed?

A. Provident Mutual Life Insurance Company.

Q. How long have you been employed as actuary with the Provident Mutual Life Insurance Company?

A. Fourteen years.

Q. In the course of your employment you work on actuarial problems?—

MR. COOPER: Perhaps we can shorten this by having the witness state the value, over my objection.

THE COURT: I suppose he wants to bring out qualifications.

MR. COOPER: I am not challenging that. If he just states the value.

THE COURT: All right, get right down to the value.

By MR. PHILLIPS:

Q. Have you read this trust of Mrs. Stinson, of March 1928?

A. I have read a copy of it.

Q. You have read a copy of it?

A. Yes, sir.

Q. And have you calculated the value of the power of appointment that is referred to by Mrs. Stinson after the death of her two daughters without issue?

A. Yes.

Q. What value would you place on each dollar of principal?

A. The value I would place on that reverter would be 1.24 of one percent.

Q. That would be a little over a cent on the dollar?

THE COURT: 1.24 cents on the dollar.

By MR. PHILLIPS:

Q. You have done that by consulting tables and other information at your disposal?

A. That is correct.

MR. PHILLIPS: In view of the stipulation I will submit the witness to cross-examination at this time.

THE COURT: All right.

Cross-examination.

By MR. COOPER:

Q. Have you figured what the total would be,—what would you figure that interest to be worth?

A. For each one dollar of principal—

Q. And that is multiplied by $84,000?

A. Yes. 1.24 multiplied by the amount of the principal. I do not know that amount.

MR. COOPER: Nothing further.

MR. PHILLIPS: That is all, Mr. Hendrickson.

MR. PHILLIPS: Mrs. Whitridge, will you take the stand, please.

THE COURT: I am a little bit confused as to the value, —the 1.24 multiplied by 84,000—

MR. PHILLIPS: The principal of this trust on the death of the decedent was $84,000, and we have stipulated that the value of the remainder after the death of the two girls would be 14 cents on the dollar, which would make the total .14 times 84,000, which would be about $11,000; and this reverter is still further removed by reason of the contingency and condition that the two daughters must die without issue. That involves the probabilities of these daughters marrying and having issue, because only in the event that there are none would the reverter ever take effect; therefore, its value is still further reduced, and this witness has testified that the value of such remainder would be 1¼ cents on the dollar of principal.

THE COURT: Yes, that is it,—1.24 cents on the dollar of principal. I see.

MR. PHILLIPS: That would be about eight or nine hundred dollars.

FLORENCE STINSON WHITRIDGE, having been duly sworn was examined and testified as follows:

Direct-examination.

By MR. PHILLIPS:

Q. You are one of Mrs. Stinson's daughters, is that correct?

A. That is right.

Q. I suppose that you lived with your mother all your life?

A. Yes, sir.

Q. By the way, where did you go to school?

A. The Baldwin School, right across the street.

Q. And after that?

A. I went to Bryn Mawr for two years.

Q. Did you live at any of the schools, or did you come home?

A. Before mother's death I was planning to live at college, but I only lived there about two months.

Q. You had always lived at home?

A. Yes, sir.

Q. And you had abundant opportunity to observe your mother?

A. Yes, sir.

Q. Did you ever know of any illness?

A. None that I can remember.

Q. You do not know anything about the creation of this trust, as I understand it?

A. No.

Q. What kind of a person was your mother? Was she active?

A. She was very active.

Q. Did she manage the household?

A. Yes, indeed.

Q. Did she attend to the household and taking care of the grounds around the house?

A. She did not actually work outdoors, but she would oversee the garden.

Q. Did you go abroad with her in 1930?

A. Yes.

Q. What kind of a trip was that,—did she spend all her time in a hotel or did she travel around?

A. We covered four countries,—three months abroad, travelling almost continuously.

Q. Did she do much walking?

A. Well, we saw all places of historical interest that we could possibly cover in that time.

Q. She climbed around with you?

A. Yes.

Q. She didn't stay home while you went out?

A. Oh, no.

Q. She was perfectly well, as far as you know, during that trip?

A. Absolutely.

Q. Did you accompany your mother on these annual trips to Maine?

A. Every year.

Q. For how long was that,—as long as you can remember?

A. I think from about 1924.

Q. From about 1924?

A. Yes.

Q. Did you ever observe any indications of ill-health in your mother?

A. Not until the last summer in 1934.

MR. PHILLIPS: Cross-examine.

Cross-examination.

By MR. COOPER:

Q. When did you first notice your mother complain, or did she complain at all?

A. No, she did not,—you mean before that summer, never.

Q. At any time that you recall?

A. No, never.

Q. Did she complain before her death at all?

A. No.

Q. Of what did your mother die?

A. Well, after she died, we were told she had a heart condition; she died of heart trouble. That is what caused her death, we were told.

MR. COOPER: That is all.

By THE COURT:

Q. In 1934, you say that summer you noticed the condition of your mother?

A. She had tonsillitis that summer.

Re-direct-examination.

By Mr. Phillips:

Q. Were you present when this picture was taken? (Indicating)

A. Yes, this was taken the day of my coming-out.

Q. She came back from Maine for that purpose?

A. Yes, sir.

Q. And did she actively look after the preparations of that occasion?

A. Yes, sir, she did.

Mr. Phillips: I will offer this picture in evidence. If it is to be a physical exhibit, I would like to have it marked—

The Court: I do not need it.

Mr. Phillips: That is all, then.

Mr. Phillips: Mrs. Day, will you take the stand.

Nancy Stinson Day, having been duly sworn was examined and testified as follows:

Direct-examination.

By Mr. Phillips:

Q. You are a daughter of Mrs. Stinson?

A. Yes.

Q. I understand that you do not remember anything about the creation of this trust?

A. No, nothing at all.

Q. Did you live at home with your mother all your life?

A. Yes, sir.

Q. Did you go away to school anywhere?

A. No, I never did.

Q. What kind of a person was your mother; how was her health during the time you knew her?

A. Perfect.

Q. Ever know of an illness?

A. No, never.

Q. Was she active in the management of her household, garden, and so on?

A. Very, very.

Q. Did she look after the servants?

A. Yes.

Q. Do you recall her ever having a meal in bed?

A. No.

Q. And you went along on this trip abroad in 1930?

A. Yes, sir.

Q. And would your testimony about that be the same as your sister's?

A. Exactly the same.

Q. You went to all the places with her?

A. Yes.

Q. And did your mother go to all places with you?

A. Yes.

Q. And how about climbing Cathedrals?

THE COURT: Climbing what?

THE WITNESS: Climbing the steps.

By MR. PHILLIPS:

Q. And did she go inside the cathedrals?

A. Yes, sir.

Q. Climb any hills, do you recall?

A. Mount St. Michel. She went to the top of that.

By THE COURT:

Q. How long was your mother sick?

A. When she was in Maine?
Q. No, when she died.
A. About an hour I guess.

MR. COOPER: How long?

THE COURT: About an hour, she said.

MR. PHILLIPS: Cross-examine.

Cross-examination.

By MR. COOPER:

Q. Mrs. Day, were either you or your sister married at the time of your mother's death?

A. No.

Q. Neither of you had been married at that time?

A. No.

Q. You say that you never heard your mother complaining at all?

A. Not at all.

Q. She was active right up to the last?

A. Yes, because she was in town at the hairdresser's when she had the heart attack; we were planning for dinner that night. It was just one activity after another.

Q. She looked after her business affairs, did she?

A. Yes, sir.

MR. COOPER: That is all.

MR. PHILLIPS: Mrs. Conroy.

NELLIE CONROY, having been duly sworn was examined and testified as follows:

Direct-examination.

By MR. PHILLIPS:

Q. Mrs. Conroy, you are employed as cook in Mrs. Stinson's house, is that correct?

A. Yes, sir.

Q. When did you first come with her?

A. In 1924.

Q. And did you stay in that capacity until her death?

A. Yes, sir.

Q. You are still working for one of the daughters in that same capacity?

A. Yes, sir.

Q. Did Mrs. Stinson participate in the management of your part of the household?

A. Yes, sir.

Q. Did she tell you what kind of meals to have, and so on?

A. Yes, sir.

Q. Do you recall any occasion when you served a meal to her in bed for any reason?

A. No, none.

Q. Do you know of any illness on the part of Mrs. Stinson prior to her death?

A. No, I do not.

Q. Did she appear active and healthy during all the time that you knew her?

A. Yes, sir.

Q. Did she look after the two girls?

A. Yes, sir.

Q. And the rest of the household, and the garden?

A. Yes, sir.

MR. PHILLIPS: Cross-examine.

Cross-examination.

By MR. COOPER:

Q. Were you with her at the time she made the trip to Maine, the last trip?

A. No, I was not, sir.

Q. You didn't work for her?

A. I did, but I was home.

Q. You were employed by her when she returned from that trip?

A. Yes, sir.

Q. Did you notice any slowing up of her activities after that?

A. No, sir.

Q. To you she appeared just as active after this trip to Maine?

A. Yes, she managed all of her affairs.

Q. She had tonsillitis at that time?

A. I don't know anything about that.

MR. COOPER: That is all.

By THE COURT:

Q. Did she ever complain to you about her heart?

A. No, sir.

Q. Never?

A. No, your Honor.

THE COURT: All right.

MR. PHILLIPS: That is all, your Honor.

MR. PHILLIPS: Dr. Lincoln.

DR. CLARENCE W. LINCOLN, having been duly sworn was examined and testified as follows:

Direct-examination.

By MR. PHILLIPS:

Q. Dr. Lincoln, you are a brother-in-law to Mrs. Stinson are you not?

A. Yes, sir.

Q. Were you the family physician for many years?

A. I attended the children when they were sick. I do not know of any other doctor that they had, and I do not remember seeing Mrs. Stinson for any troubles.

Q. You do not recall ever having attended her?

A. I do not recall ever attending her.

Q. How long have you practiced medicine?

A. I graduated in 1893, and I was in the laboratory for a year or two,—I started in 1896.

Q. You gave up the active practice of medicine some years ago?

A. About five years ago.

Q. Do you recall the occasion of Mrs. Stinson's tonsillitis attack in the summer of 1934?

A. Yes, sir.

Q. Were you in Maine at the time?

A. I was in Maine; she was in my house, and had this attack of tonsillitis.

Q. What did you do about that?

A. The usual treatment,—tucked her in bed, and soothed her pain, and gave her medicine as indicated.

Q. She recovered sufficiently to—

A. She recovered and got up, but I pleaded very strenuously against her going home, but she had these cards out for this coming out of her daughter.

Q. This party?

A. And she had to go home, but I very much pressed her not to go home.

Q. Were you present when she actually died?

A. I was.

Q. I think you were present when she was first taken ill, or, tell us what you know about it?

A. I received a telephone message from a hairdressers that Mrs. Stinson had fainted in the hairdressing shop and wanted me to come in. I came in on the first train I could get —

By The Court:

Q. Was that in the City?

A. That was in the City.

I came in on the first train I could get, and found her recovered, but she was worried about going home alone.

By Mr. Phillips:

Q. That was at the hairdressers?

A. That was at the hairdressers.

I went home with her in her car, and went up with her to her room, and helped her to undress, and then she wanted to take off her corset and went into the big closet and fell in there. I called Dr. Christy, a neighborhood doctor, but we could not make her recover.

Q. And she died there?

A. She died.

Mr. Phillips: Cross-examine.

Cross-examination.

By Mr. Cooper:

Q. Did you ever have occasion to inform yourself about her physical condition around March of 1928?

A. No, I was not consulted. As her brother-in-law I thought she was perfectly well and had no worries.

Q. Did you have occasion ever to examine her?

A. I do not think I did.

Q. You are speaking now only around March, 1928 or—

A. I do not think I ever took her blood pressure or examined her heart.

Q. You did not know, then, until her actual death that she apparently was suffering from a heart ailment.

A. No, I did not know.

Q. Were you the only physician who attended Mrs. Stinson?

A. I have no knowledge of any other.

Q. She never had medical attention up until her last illness?

A. As far as I know she had not.

MR. COOPER: That is all.

By THE COURT:

Q. What was the exact cause of her death?

A. I think it was a damaged heart due to this tonsillitis; that is the way I took it, got up too soon.

Q. She did not suffer a stroke?

A. No, no.

Q. And there was no blood clot?

A. No.

Q. Did she complain of her heart at Sargentville?

A. I do not remember how I formed the opinion, but I felt that she should not get up and strenuously urged her not to,—whether it was simply the acute depression of the sickness at the time, I do not know.

THE COURT: All right.

By MR. COOPER:

Q. That was in September, 1934, that you had reference to there?

A. Yes, that was in September, 1934.

Q. But, you had no knowledge of her physical condition in or around March of 1928, or prior thereto?

A. No, I do not.

By THE COURT:

Q. You had no knowledge of her physical condition,—you were her brother-in-law,—you had knowledge of her physical condition generally?

A. Yes, I know.

By Mr. Cooper:

Q. How did you gain that knowledge?

A. Simply from being her brother-in-law and knowing her.

Q. But you never made any physical examination?

A. I never made any physical examination to my recollection.

Q. Would it have been possible that this heart ailment had persisted for some time?

A. Oh, yes, yes, that is possible, but she had no symptoms of it.

Q. No outward symptoms?

A. No, no symptoms of it.

Q. How would these symptoms have been disclosed,—by—what do you call it,—clinical examination?

A. If she had had a clinical examination there might have been some symptoms.

Q. They would have been disclosed?

A. But as far as I know, she had none.

Mr. Cooper: Thank you, that is all.

Mr. Phillips: Mrs. Whitridge, will you just take the stand again?

Florence Stinson Whitridge, recalled.

Direct-examination (Continued).

By Mr. Phillips:

Q. Mrs. Whitridge, do you know of any other physician ever attending your mother other than Dr. Lincoln?

A. No, I do not.

Q. Did he ever attend you?

A. Yes, lots of times when we were sick.

Q. He was in your home often as physician for you and your sister?

A. Yes.

MR. PHILLIPS: That is all. I think we are through.

THE COURT: All right, the Plaintiff rests.

MR. PHILLIPS: Yes, the plaintiff rests, if your Honor please.

DEFENDANT'S EVIDENCE.

MR. COOPER: I merely want to offer in evidence a certified copy of the claim for refund as Defendant's Exhibit 1,—a certified photostatic copy.

THE COURT: Is that in the stipulation?

MR. PHILLIPS: That is in the stipulation.

THE COURT: All right.

(The document referred to was marked Defendant's Exhibit 1, and is filed with these proceedings.)

MR. COOPER: We have also stipulated that claim for refund was filed—

MR. PHILLIPS: Perhaps I should have offered that in evidence.

THE COURT: That is what struck me, but it is all right.

MR. PHILLIPS: There is no reason for it being in the second time.

MR. COOPER: The defendant rests, your Honor.

I have no written request for findings and conclusions which I have prepared to file at this time,—unless the court would permit the request for findings and conclusions to be filed with the brief.

THE COURT: I think you better do that.
Did counsel want to be heard?

MR. COOPER: I do not, as far as I am concerned.

THE COURT: I would not mind hearing you, it is a very interesting question.

(Discussion off record.)

THE COURT: All right, when do you want to file brief?

MR. COOPER: If your Honor would give me forty-five days.

(Discussion off the record.)

THE COURT: And I think you ought to file your requests with these briefs.

MR. PHILLIPS: All right, I will send them down to your Honor.

MR. COOPER: That will give us each forty-five days in which to file briefs.

THE COURT: And Mr. Phillips gets ten days within which to file a reply brief to your brief.
Then, it will be set down for argument.

6. OPINION.

GANEY, *J.*:

This is an action by the plaintiffs, against the defendant in the sum of Thirteen Thousand, Four Hundred Forty-two and 90/100 Dollars ($13,442.90), with interest from December 24, 1936, which is the portion of the estate tax paid by the plaintiffs, allegedly erroneously, by reason of the inclusion by the defendant in the gross assets of the estate of the decedent the corpus of a trust valued at the date of the decedent's death, at Eighty-four Thousand, Four Hundred Thirty-three and 49/100 Dollars ($84,433.49).

With respect thereto the Court makes the following

FINDINGS OF FACT:

(1) The plaintiffs are the executors of the Estate of Anna C. Stinson, a widow, a former resident of Bryn Mawr, Pennsylvania, who died testate on November 17, 1934, at the age of fifty-one (51) years.

(2) The decedent was survived by two daughters, Florence V. Stinson, then nineteen years of age, and Nancy C. Stinson, then seventeen years of age, neither of whom had married, and by James C. Workman, Mary W. Lincoln, Adelaide W. Denny and Robert A. Workman, her brothers and sisters.

(3) On September 5, 1935, the Executors filed an estate tax return showing an estate tax due of Fifty-three Thousand, Three Hundred Eighty-six and 59/100 Dollars ($53,386.59); in this return there was not included the value of the property of a certain trust created on March 26, 1928, the value of which at the date of the decedent's death was Eighty-four Thousand, Four Hundred Thirty-three and 49/100 Dollars ($84,443.49).

(4) An audit by the Commissioner of Internal Revenue of the estate tax return, resulted in an increase in the value of the decedent's gross estate in the amount of the corpus of the trust to wit: Eighty-four Thousand, four Hundred Thirty-three and 39/100 Dollars ($84,433.39).

(5) On November 22, 1939, the Executors filed a claim for refund in the amount of Thirteen Thousand, four Hundred Forty-two and 90/100 Dollars ($13,442.90), alleging as a ground therefor that there had been erroneously included as part of the decedent's estate the value of the corpus of the trust created by the decedent on March 26, 1928.

(6) The Commissioner of Internal Revenue on May 3, 1941, denied the contention that the Trust corpus should not be included in the decedent's gross estate, thereby dismissing the claim and hence the plaintiffs suit for the amount of the tax, to wit: Thirteen Thousand, four hundred forty-two and 90/100 Dollars ($13,442.90).

(7) A deed of trust, executed by the decedent hereinafter referred to, contained the following provisions important to this action:

> "In Trust, Nevertheless, to and for the following uses, intents and purposes:
>
> In Trust to take, hold, manage and control and to invest and keep invested and the net income therefrom to pay at quarterly or other convenient periods to the said Settlor for and during all the term of her natural life, and at her death.
>
> In Trust to pay the said net income, in equal shares, to Florence V. Stinson and Nancy C. Stinson, daughters of the said Settlor, during their respective lives.

IN TRUST, at the death of each daughter of said Settlor, to pay over the corpus or principal supporting such daughter's share of income to her then living descendants, per stirpes, absolutely.

IN TRUST, in the event of the decease of either daughter of said Settlor without leaving descendants surviving, to add the corpus or principal of such daughter's share to the share of the other daughter of said Settlor, if then living, or to the then surviving descendants, per stirpes, of such other daughter if then dead, such descendants to take their deceased ancestor's share by representation; the share so accruing to a surviving daughter of said Settlor to be held upon the same trusts as her original share.

IN TRUST, in the event of the death of both daughters of said Settlor without leaving descendants surviving, to pay over the corpus or principal of the within created trust estate to such person or persons and upon such estate or estates as the said Settlor shall by her last Will and Testament direct, limit and appoint, and in default of such appointment then to assign, transfer and pay over the said corpus of principal of the within created trust Estate to the Presbyterian Home for Aged Couples and Aged Men of the State of Pennsylvania, at Bala, Pennsylvania; the Presbyterian Orphanage in the State of Pennsylvania now located at Chester Avenue and Fifty-eighth Street in the City of Philadelphia; the Presbyterian Hospital now located at Thirty-ninth and Filbert Streets, Philadelphia; the Bryn Mawr College at Bryn Mawr, Pennsylvania, and the Philadelphia Home for Incurables now located at Forty-eight Street and Woodland Avenue, Philadelphia, in equal shares, absolutely.

* * * * * * * *

IT IS HEREBY DECLARED BY THE said Settlor that she has been fully advised as to the legal effect of the execution of this Indenture and informed as to the character and amount of the property hereby transferred and conveyed; and, further, that she has given consideration to the question whether the settlement herein contained shall be revocable or irrevocable, and she hereby declares it to be irrevocable, and that it shall stand without power in her, the said Settlor, at any time to revoke, change or annul any of the provisions herein contained."

(8) At the time of the creation of the trust on March 26, 1928 the decedent was a widow, approximately 45 years of age, the mother of two daughters, twelve and ten years respectively, with four brothers and sisters living; she was in excellent health with no evidence of any illness of any kind, nor any expectancy of an early death and was possessed of property of the value of Seven Hundred Sixty-five Thousand Dollars ($765,000.00), Seven Hundred Thousand Dollars ($700,000.00) of which consisted of securities and Sixty Five Thousand Dollars ($65,000.00) the value of the property in which she resided.

(9) On June 6, 1930 the decedent executed a will, paragraph fourth thereof included the following:

FOURTH: All the rest, residue and remainder of my estate, real, personal and mixed, of which I may die siezed and possessed, or which I may have in expectancy or remainder, or over which I may have power of disposition by Will, hereby expressly exercising any such power in me vested, I give, bequeath and devise to my Executors hereinafter named, In Trust, nevertheless, to take, hold, manage and control,

* * *

* * * * * * * *

IN TRUST, in the event that at the time of the decease of the last survivor of my said two daughters there shall be no descendants of either of my daughters then living, then my said residuary estate shall continue in the hands of my Trustees, in Trust, and the net income therefrom shall be paid in equal shares to my brothers and sisters, James C. Workman, Mary W. Lincoln, Adelaide W. Denny and Robert A. Workman, for and during their respective lives, and upon the decease of each, or upon my decease, in the case of any of them who may predecease me, to assign, transfer and pay over the share of corpus or principal producing, or which would have produced the share of income of my brother or sister so dying, in equal shares, to The Presbyterian Hospital in Philadelphia, The Contributors to the Pennsylvania Hospital, The Philadelphia Home for Incurables and The Board of National Missions of the Presbyterian Church of the United States of America for the general purposes of the said organizations, and to be known as "The Robert M. Stinson Memorial."

(10) Since decedent's death, there has been born to her two daughters, three children, so that presently there are surviving her two daughters and three granddaughters.

(11) The trust was testamentary in character and was intended as a substitute for a testamentary disposition in that it was intended to take effect in possession or enjoyment after the death of the decedent.

The Court makes the following

CONCLUSIONS OF LAW:

(1) The transfer by trust made on March 26, 1928 was intended to take effect in possession and enjoyment at or after the decedent's death within the meaning of Section 302 (c) of the revenue Act of 1926, as amended,

and the value of the property of the trust at the date of the decedent's death was Eighty-four Thousand, Four Hundred thirty-three and 39/100 Dollars ($84,433.39), and this was properly included in the value of her gross estate for estate tax purposes.

(2) The Commissioner of Internal Revenue has correctly assessed the amount of federal estate tax due from the decedent's estate and there has not been an overpayment of such tax.

(3) The federal estate tax sought to be recovered was properly and lawfully determined and assessed by the Commissioner of Internal Revenue, and legally collected from the plaintiffs by the defendant, and by reason thereof, the complaint must be dismissed and the costs assessed against the plaintiff.

(4) On the facts and the law judgment of the court must be against the plaintiff and in favor of the defendant.

OPINION.

The defense interposed against the plaintiffs' claim for refund of the estate tax here paid is twofold, (1) That the property transferred under the trust indenture of March 26, 1928 was made in contemplation of death and (2) that the transfer thereof was intended to take effect in possession or enjoyment at or after the decedent's death.

While a life estate is reserved to the settlor in the trust indenture here considered, it is to be remembered that the amendment to Section 302 (c) taxing transfers with life estates reserved to the grantor was adopted March 3, 1931 and the date of this trust indenture was March 26, 1928, and therefore the amendment is not applicable. Furthermore, the amendment cannot take effect retroactively. Hassett v. Welch, 303 U. S. 303; 58 S. Ct. 559, 82 L. Ed. 858.

With reference to the first contention made by the defendant that the transfer was made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926 as amended, it must be borne in mind that no evidence of any physical disability on the part of the decedent was shown by the defendant. On the contrary however, it is not denied that the decedent prior to her death had been in excellent health, with no evidence of any illness, nor any evidence of an anticipation of early death. At the time of the creation of the trust she was in the prime of life, about 45 years of age, the mother of two daughters, ten and twelve respectively and possessed of a considerable fortune, in excess of three quarters of a million dollars. While it is now settled law that "contemplation of death" within the meaning of the statute does not of necessity imply fear of imminent death, nor need there be a condition existing creating "a reasonable fear that death is near at hand," nevertheless it must be such a transfer that the person making it, is influenced to do so, by such an expectation of death arising from bodily or mental conditions, as prompts him to dispose of his property to those he deems proper objects of his bounty. Milliken v. United States, 283 U. S. 15. In United States v. Wells, 283 U. S. 102, at 118, the court describes the meaning of the phrase as follows: "The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is 'near at hand'." Since it is the thought of death which must be the controlling motive prompting the disposition of property, it is requisite that careful scrutiny be given to the circumstances of every case in order that one might detect the dominating motive of the donor in the light of his bodily and mental condition in giving effect to the

purposes of the statute. Russell et al. v. United States, 38 Fed. Supp. 438. A careful consideration of all the circumstances surrounding this transfer does not convince me that it was made in contemplation of death.

With respect to the other contention of the defendant that the transfer was intended to take effect in possession or enjoyment at or after the death of the settlor, it is to be remembered, although the tax is a death tax, that Section 302 (c) of the Revenue Act of 1926 applies to any interest in gifts inter vivos which, by their provisions, are "intended to take effect in possession or enjoyment at or after death," and such gifts are subjected to the tax as a death tax if they are not complete until the donor's death. Reinecke v. Northern Trust Co., 278 U. S. 339, 345. The taxable event is the transfer inter vivos but the measure of the tax is the value of the transferred property at the time of the death of the transferor. It seems to me therefore that the time to be considered in gleaning the intent or motive of the transferor in any case is, as here, the time of the transfer under the trust indenture of March 26, 1928. In other words, we are to consider the situation as created by the language of the trust indenture at the time of the transfer and not in the light of what has eventuated thereunder, as for instance the progress of the estates created. In so doing, we find that the transferor made provision for the reversion to her of the corpus of the fund in the event that her daughters predeceased her or if they died without issue or if leaving issue, they should predecease them. In the happening of any of these events, pursuant to the terms of the deed of trust, the corpus was to be disposed of by the settlor in her last will and testament.

Our question then is, was the transfer under the deed of trust of March 26, 1928 irrevocable, complete and unaffected in any manner by the death of the settlor, or was it while irrevocable, yet incomplete in the giving, and to that extent to take effect at or after the death of the settlor?

In determining this question we have recourse to a number of cases in which the statute has been construed by the Supreme Court. In Klein v. United States, 283 U. S. 231, the habendum clauses in a deed conveyed a life estate to the grantee providing that if she should die prior to the decease of the grantor, the reversion in fee should remain vested in the grantor, but that if the grantee should survive the grantor, the said grantee should take the lands in fee simple. It was held by the court that the remainder was retained by the grantor, and whether it would ever become vested in the grantee, depended upon the condition precedent that the death of the grantor happen before that of the grantee, and the grant of the remainder was therefore contingent. Further the court said at page 234: "It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed." The principle which the court invoked in this case in subordinating the niceties of the law of contingent and vested remainders to the more realistic views of taxation was rejected in Becker v. St. Louis Trust Co., 296 U. S. 48, and in Helvering v. St. Louis Trust Co., Ibid. 39. In this latter case the decedent, several years prior to his death, created a trust in favor of his daughter for life, with remainder to certain named persons, with a provision amongst other that if his daughter predeceased him, the trust should terminate and be paid over to him absolutely. In construing this language the court held that the corpus was not taxable as part of the decedent's gross estate, saying at page 43: "After the execution of the trust he held no right in the trust estate which in any sense was the subject of testamentary disposition. His death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility." The court

drew a distinction between this case and the Klein case, supra, by saying that in the latter case the grantor by having died first, his death effected the transmission of a larger estate to the grantee, but that in the St. Louis Trust Co. case, the grantor parted with the title and all beneficial interest in the property, retaining nothing which could pass to anyone as a result of his death and that his death destroyed all possibility of the grantor coming into possession of the reversionary interest. In Helvering v. Hallock, 309 U. S. 106, the settlor in the trust agreement provided for a life estate to his wife and if she predeceased him, it was to revert to the settlor but that if the settlor should die first, then after the expiration of the life estate to his wife, the corpus was to go to his son and daughter, share and share alike. In this case the court rejected the theory of the Helvering v. St. Louis Trust Co. supra and Becker, supra, and returned to the doctrine of the Klein case, supra, holding that it was the intent of Section 302 (c) to include in the gross estate gifts inter vivos which are resorted to as a substitute for a will, in making disposition of property operative at death and to effectuate this purpose, practical considerations of taxation should prevail and not the niceties of the art of conveyancing; that as in the Klein case, supra, the decedent's death operating on his gift inter vivos not complete until his death, is the event which calls the statute into operation. Here, I feel the instant case falls within the doctrine of Helvering v. Hallock, supra, as the gift was not a complete transaction but rather it was one where the settlor wished to keep the corpus of the trust for herself for disposition in the event she survived her daughters without issue and this string provided in the trust agreement—the possibility of which was great or remote depending upon the life of her daughters, and their issue—was sufficient to bring it within the terms of the statute. The plaintiff has pressed upon the court the case of Commissioner v. Kellogg, 119 Fed. (2d) 54, decided in this circuit as ruling the

instant case. In that case, the grantor reserved to himself an estate for life and then to his wife and upon the death of the survivor of these two the corpus was to be divided into as many parts as there were surviving children, together with one equal part for each of the children then dead, but leaving spouse or issue surviving. One half of the share of each child was to be paid over when the child reached twenty-one years of age and the other one-half when it became thirty-two years of age. Upon the death of a child who received his share, such share was to pass to his spouse or issue as he should appoint by will, or in default thereof, to his next of kin. That if all of the children of the grantor and his wife should predecease them, leaving no spouse or issue, all of the corpus was to pass to the next of kin as provided by the laws of New Jersey relating to the disposition of personal property in the case of intestacy. However, this case is distinguishable from the instant case, in that in the former the generating source of the whole title was the trust instrument but in the instant case the death of the settlor was the final factor which gave completeness to the gift. In other words, in the Kellogg case, supra, there was a complete divestment of title and a complete irrevocable gift of the entire title by the settlor but in our case while the trust was irrevocable, the gift was not complete until the death of the settlor which resulted in defining those to be the beneficiaries of the possible reversionary interest. There was here a string on the gift which was not present in the Kellogg case, supra. Whatever may have been the situation before the decision in Helvering v. Hallock, supra, I think the possibility of the reversionary interest going back to the settlor had her children died before here, or had they died without leaving issue, was terminated by her death and this determination of her interest was an event which rendered the interest includable in her gross estate. To take into consideration the relative ages of the settlor and her daughters, in attempting to weigh the probability of

the reversionary interest ever going to the settlor and as a consequence her power to make disposition of it, advances the solution of the question here involved, not at all, since it is sufficient if the contingency exists which might bring the reversionary interest within the powers set out in the trust instrument and implemented by the will.

Accordingly, I hold that the life interests of the decedent's daughters and the interest given to the decedent's brothers and sisters (by deed in trust supplemented by the will) constitute the remainder, after the decedent reserved a life estate over which the decedent retained a string or measure of control, and that the death of the decedent was the event or contingency which suspended the ultimate disposition of the property and upon the authority of the Klein and Hallock cases, supra, the entire value of the property on the date of the decedent's death was properly taxed as part of her gross estate as a transfer intended to take effect in possession or enjoyment at or after death.

Judgment is accordingly entered for the defendant.

7. JUDGMENT.

Before GANEY, *J.*

AND NOW, to wit: January 8th, 1943, in accordance with the opinion of the Court, it is ORDERED that Judgment be and hereby is granted in favor of defendant, Walter J. Rothensies, Individually and as Collector of Internal Revenue for the First District of Pennsylvania and against the Plaintiffs, Fidelity-Philadelphia Trust Company and Robert A. Workman, Executors of the Estate of Anna C. Stinson, Deceased, with costs.

By The Court:
Attest: GILBERT W. LUDWIG,
Deputy Clerk.

[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1942

No. 8291

FIDELITY-PHILADELPHIA TRUST CO., et al., Exrs. Est. Anna C. Stinson, Appellants,

vs.

WALTER J. ROTHENSIES, etc.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

And now, to-wit: this 17th day of May A. D. 1943, it is ordered that Hon. Calvert Magruder, U. S. Circuit Judge, for the First Circuit, be, and he is hereby assigned to sit in above case in order to make a full court.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Assigning Hon. Calvert Magruder for Argument. Received and Filed May 17, 1943. Wm. P. Rowland, Clerk.

[fol. 82] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1942

No. 8291

FIDELITY-PHILADELPHIA TRUST COMPANY and ROBERT A. WORKMAN, Executors of the Estate of Anna C. Stinson, Deceased, Appellants,

vs.

WALTER J. ROTHENSIES, Individually and as Collector of Internal Revenue

And afterwards, to wit, the 17th day of May, 1943, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Calvert Magruder and Honorable Charles Alvin Jones, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 15th day of May, 1944, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 83] UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT, OCTOBER TERM, 1942

No. 8291

FIDELITY-PHILADELPHIA TRUST COMPANY and ROBERT A. WORKMAN, Executors of the Estate of Anna C. Stinson, Deceased, Appellants,

v.

WALTER J. ROTHENSIES, Individually and as Collector of Internal Revenue for the First District of Pennsylvania

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Biggs, Magruder and Jones, Circuit Judges

OPINIONS OF THE COURT—Filed May 15, 1944

By BIGGS, Circuit Judge:

On March 26, 1928 Anna C. Stinson irrevocably transferred certain property to a trust which she created. Mrs. Stinson was the mother of two daughters who at that time were minors and unmarried. The indenture provided that the income from the trust was to be paid to the settlor dur-[fol. 84] ing her lifetime [1] and upon her death to her daughters, in equal shares during their respective lives. At the death of each daughter, the corpus or principal supporting that daughter's share of income was to be paid to her descendants *per stirpes*. In the event that either daughter died without leaving descendants surviving her, the corpus or principal supporting that daughter's share of income was to be added to the share of the other daugh-

[1] The retention of the life estate by Mrs. Stinson is not sufficient in itself to render the corpus of the trust includible in her estate for estate-tax purposes. See Note 3 of the opinion in Commissioner of Internal Revenue v. Kellogg, 119 F. 2nd 54, at page 56.

ter if she was then living, or should go *per stirpes* to the surviving descendants of the other daughter if she was then dead. In the event of the death of both daughters without leaving surviving descendants, the corpus was to be paid to such persons as the settlor should appoint by will. In default of such appointment, the trustee was to pay the corpus to certain charities named in the indenture. Mrs. Stinson died on November 17, 1934 at the age of fifty-one. Both daughters survived her and at the time of their mother's death were unmarried. At the time of the hearing before the court below both daughters were married. One daughter had one child; the other, two children.

The primary question presented for our determination is whether Section 302(c) of the Revenue Act of 1926, 44 Stat. Vol. 2, 70, requires the inclusion of the corpus of the trust in Mrs. Stinson's estate for estate-tax purposes.

The learned District Judge held that the trust was testamentary in character and that gifts granted by the indenture were, to employ the language of the statute, "intended to take effect in possession or enjoyment at or after . . . death . . .".[2] He based his conclusions on the decisions of the Supreme Court in Klein v. United States, 283 U. S. 231, and Helvering v. Hallock, 309 U. S. 106. The [fol. 85] appellants rely on the decision of this court in Commissioner of Internal Revenue v. Kellogg, 119 F. 2nd 54.

Turning to Helvering v. Hallock, supra, which must control our decision in the case at bar, Mr. Justice Frankfurter directs our attention (309 U. S. at p. 110) to the necessity of determining "Whether the transfer made by the decedent in his lifetime is 'intended to take effect in possession or enjoyment at or after his death' by reason of that which he retained, . . ." That is the crux of the problem. The tax tribunals are admonished to avoid decisions based upon linguistic refinements and verbal resemblances of one trust indenture to another. The St.

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[2] The District Court in its eleventh finding of fact stated:

"The trust was testamentary in character and was intended as a substitute for a testamentary disposition in that it was intended to take effect in possession or enjoyment after the death of the decedent."

Louis Trust cases (Helvering v. St. Louis Trust Co., 296 U. S. 39 and Becker v. St. Louis Trust Co., *Ibid* p. 48) were expressly overruled, as was the decision of this court in Rothensies v. Cassell, 103 F. 2nd 834,[3] whereas the decision of the Court of Appeals for the Second Circuit in Bryant v. Commissioner, 104 F. 2nd 1011, was affirmed.

In every one of the cases overruled by the Supreme Court in Helvering v. Hallock the settlor or testator had created express conditions or contingencies upon the happening of which he could have regained the corpus of the trust. In each case the Supreme Court held that the settlor or testator had made gifts testamentary in character and intended to take effect in possession or enjoyment at or after his death.[4]

In the case at bar, Mrs. Stinson did retain a string or tie, whereby, upon the happening of certain contingencies she could have regained control of the corpus of the trust at least to the extent of making it subject to testamentary bequests. Must it be said that for this reason she, like the grantor in Helvering v. Hallock, ". . . selected to hold in suspense the ultimate disposition of . . . [the] property until the moment of . . . death."? We think [fol. 86] that the answer must be in the affirmative. The case at bar is distinguishable from the Kellogg case on which the appellant strongly relies for in that case, as we have stated, 119 F. 2nd at p. 57, ". . . the fact of importance . . . is that the grantor during his lifetime disposed of his interests in the corpus of the trust as well as any man could." Kellogg retained nothing. He had merely a possibility of reverter. As is said in Paul's "Federal Estate and Gift Taxation" Volume I at p. 367, this limitation upon Helvering v. Hallock is a "possible" one.[5]

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[3] In the Supreme Court *sub nomine* Rothensies v. Huston.

[4] Cf. the facts of May v. Heiner, 281 U. S. 238; Reinecke v. Trust Co., 278 U. S. 339; and Shukert v. Allen, 273 U. S. 545.

[5] Mr. Paul also states, Idem at p. 368, "The Third Circuit's refusal to extend the *Hallock* case to a remote reverter contingent upon the survival of the grantor's own next of kin is understandable. It is doubtful, however, whether the rule of that case is dependent upon an express reservation in the trust instrument. A string or tie supplied by a rule of law is as effective as one expressly retained in

The indenture in the case at bar, to employ technical conveyancing terms, puts the remainders in the grantor's grandchildren who were not *in esse* at the time the indenture was executed and the grantor could have recovered the right to dispose of the corpus on the happening of the specified contingencies. For these reasons the case at bar is closer to Klein v. United States, 283 U. S. 231, than to May v. Heiner, 281 U. S. 238.

The appellants contend that if the property transferred is to be included the value of intervening estates must be deducted, citing Helvering v. Hallock (specifically that part of that opinion dealing with Bryant v. Helvering) as well as the provisions of Article 17 of Regulations 80, as [fol. 87] amended by T. D. 5008[6] Neither these decisions

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the trust indenture." A string or tie supplied by a rule of law is as effective as one expressly retained in the trust indenture but the fact that the string or tie is supplied by the indenture is evidence "Whether the transfer made by the decendent in his lifetime is 'intended to take effect in possession or enjoyment at or after his death' by reason of that which he retained, . . ." Helvering v. Hallock, 309 U. S. at p. 110. If the string or tie is expressly retained by the grantor, it is one of the provisions of the indenture to be construed with others in order to determine whether the gift is to take effect in possession or enjoyment at or after the grantor's death. This, however, does not substitute a subjective test for an objective one.

The Kellogg case has been followed by the Tax Court. See Estate of Ballard v. Commissioner, 47 B. T. A. 784, 791; Estate of Bradley v. Commissioner, 1 T. C. 518, 522; Estate of Hofheimer v. Commissioner, 2 T. C. No. 99, and Estate of Houghton v. Commissioner, 2 T. C. No. 110.

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[6] The pertinent portion of the Regulations is as follows:

"Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, *if the life estate is then outstanding.*" (Emphasis supplied.)

nor the Regulations support the appellants' position for in the case at bar the first life estate was in the settlor. Since the disposition of the estate was held in suspense until her death, that event compels the imposition of the tax. The rights of the beneficiaries other than those of the grantor's daughters could not become absolute until the death of the grantor and had to remain contingent or conditional at least until the happening of that event. It is stipulated that the value of the corpus as of the date of Mrs. Stinson's death was $84,433.39 and it was upon this sum that the trial court rested its judgment. This was not error.

One final point remains for discussion. In this case the learned District Judge, while not expressly finding that the transfer to the trust was not made by Mrs. Stinson in contemplation of death, stated, "A careful consideration of all the circumstances surrounding this transfer does not convince me that it was made in contemplation of death." Since there was no substantial evidence from which it could have been found that the transfer made by Mrs. Stinson was made in contemplation of death, we think we are justified in concluding that this is the equivalent of a finding that the transfer was not made in contemplation of death. We will so treat it. Certainly there is ample evidence in the record upon which the District Court could have based that specific finding.

The judgment of the court below is affirmed.

[fol. 88] JONES, Circuit Judge, concurring:

I concur in the affirmance of the judgment of the District Court for the following reason.

Where a settlor makes an *inter vivos* transfer of property with the remainders over to a class none of whom is in being at the time of the transfer and provides that, upon ultimate failure of the class, the property shall pass as the settlor may by will appoint, it is at least as reasonable to infer that the property will ultimately pass according to the settlor's appointment as it is to infer that it will pass by virtue of the transfer to then nonexistent remaindermen. In such circumstances, I fail to see how the taxpayer can be thought to have overcome the presumptive correctness of the Commissioner's determination that the transfer, when made, included a gift of the corpus in remainder to

take effect in possession or enjoyment at or after the transferor's death by virtue of his appointment.

That rules the instant case. The facts here show that the settlor made an *inter vivos* transfer of property, reserving to herself a life estate (the transfer antedated the Joint Resolution of 1931), with succeeding life estates in her two minor and unmarried daughters and remainders over in the corpus to the descendants of the daughters or either of them with the further provision that, in the event of the death of both daughters without leaving surviving descendants, the corpus should be paid to such persons as the settlor should by will appoint.

A true Copy:

Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 89] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1942

No. 8291

FIDELITY-PHILADELPHIA TRUST COMPANY AND ROBERT A. WORKMAN, Executors of the Estate of Anna C. Stinson, Deceased, Appellants,

vs.

WALTER J. ROTHENSIES, Individually and as Collector of Internal Revenue

Present: Biggs, Magruder and Jones, Circuit Judges.

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

By the Court, John Biggs, Jr., Circuit Judge.

May 15, 1944.

Endorsements—Order Affirming Judgment. Received & Filed May 15, 1944. Wm. P. Rowland, Clerk.

[fol. 90] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Harriet G. Humphrys, Deputy Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellants, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of Fidelity-Philadelphia Trust Co., et al., Exrs. Est. Anna C. Stinson, Deceased, Appellants, vs. Walter J. Rothensies, Individually and as Collector of Internal Revenue, No. 8291, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 27th day of June in the year of our Lord one thousand nine hundred and forty-four and of the, Independence of the United States the one hundred and sixty-eighth.

Harriet G. Humphrys, Deputy Clerk of the U. S. Circuit Court of Appeals, Third Circuit (Seal).

[fol. 91] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, limited to the question whether the entire value of the corpus of the trust at the time of decedent's death should be included in the decedent's gross estate. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.